As the dissent below made clear, Congress's cosmetic change in the statute does not solve its Establishment Clause problems. The new language has resulted in the same stream of money directly pouring into the same religious coffers, *see id.* at 1103 (Lay, J., dissenting), with the putative category of recipients having been changed only from an identified, particular sect to an identified, particular set of religious beliefs. The category thus is no less religio-centric than the sect-specific category previously employed.

Judge Lay rightly noted that "the Medicare and Medicaid provisions do not specifically name any religious sect; however, every other indicator reveals that these provisions are far from neutral and that they have as their object a denominational preference for Christian Scientists." *Id.* at 1101 (Lay, J., dissenting). The majority's finding of facial neutrality wilfully ignores the fact of the statute's actual purpose and operation. *Id.* at 1103 (Lay, J., dissenting).

The reasoning below directly conflicts with the reasoning of the New York Court of Appeals' decision in *Grumet v. Pataki*, 93 N.Y. 2d 677 (1999), *cert. denied*, 120 S. Ct. 363 (1999), which held that the amendment of a plainly unconstitutional statute by inserting facially neutral language does not necessarily save the statute where the actual operation of the statute remains identical. The court in *Grumet* stated that although the new language "sets forth facially neutral criteria, any attempt to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect." *Id.* at 689, a statement that well describes the constitutionally inadequate amendment considered in this case.

within the challenged provisions or, conversely, to exclude any other denomination.

Finally, the practical effect of section 4454 does not render it facially discriminatory. Appellants contend that section 4454 effectively discriminates among sects because the "criteria for a RNHCI were carefully gerrymandered to include only the Christian Science sanitoria and to exclude as many other institutions as possible that could render the same care." However, even if appellants are correct that few facilities other than Christian Science sanitoria qualify as RNHCIs, this alone is insufficient to make section 4454 impermissibly discriminatory. *See Larson*, 456 U.S. at 246-47, n. 23, 102 S.Ct. 1673; *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971). In addition to disparate impact, a "claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn." *Id.*; *see Church of the Lukumi Babalu Aye*, 508 U.S. at 535, 113 S.Ct. 2217. Because we believe that the detailed eligibility requirements set forth by Congress for RNHCI status reflect valid secular justifications, we conclude that section 4454 does not, in effect, constitute a religious gerrymander subject to strict scrutiny.

First, section 4454's limitation of RNHCI status to those institutions that provide only nonmedical services, *see* 42 U.S.C. § 1395x(ss)(1)(F), and that serve only patients who rely upon a religious method of healing, *see* 42 U.S.C. § 1395x(ss)(1)(C), seeks to prevent fraud and abuse of the Medicare and Medicaid programs. *See* H.R. Conf. Rep. 105-217, at 769. By denying RNHCI status to institutions that do not exclusively treat persons that

embrace spiritual healing, these eligibility criteria significantly limit the number of facilities that may be reimbursed for the provision of nonmedical care and that therefore must be monitored for compliance with section 4454. This limitation enables the government, in monitoring section 4454 compliance, to focus its time and resources on patients concentrated in a relatively small number of facilities, rather than on patients in thousands of health care institutions nationwide. As a result, the administration of section 4454 is both more manageable and effective, thereby decreasing the possibility that it will be used as a tool to defraud or abuse the Medicare and Medicaid programs.

Second, section 4454's exclusion from RNHCI status of those facilities that provide medical care, *see* 42 U.S.C. § 1395x(ss)(1)(C), that employ medical personnel, *see* 42 U.S.C. § 1395x(ss)(1)(D), and that are affiliated with medical care providers, *see* 42 U.S.C. § 1395x(ss)(1)(G), seeks to ensure the safety of patients receiving medical care through Medicare and Medicaid. *See* H.R. Conf. Rep. 105-217, at 769. Without these requirements, an institution that provides both medical and spiritual healing services might qualify as an RNHCI and therefore evade the medical oversight and other quality of care standards that Medicare and Medicaid impose on all medical institutions, but not on RNHCIs. Such a result would compromise the safety of persons receiving medical care at institutions that also promote spiritual healing. Thus, these eligibility requirements ensure that only those facilities that provide no medical care are exempt from the medical oversight requirements; all others are subject to the full panoply of oversight mechanisms.

individual in [an RNHCI] only if the individual has a condition such that the individual would qualify for benefits . . . if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not [an RNHCI]." 42 U.S.C. § 1395i-5(a)(2) (emphasis added). Thus, an RNHCI patient whose illness is such that he would have received skilled care if he were at a medical institution may be reimbursed for the nonmedical services he receives at an RNHCI because, had he attended a medical facility, he would have been reimbursed for such services as part of an aggregate plan of skilled care. *See* 42 C.F.R. § 409.33(a)(1). If, however, the patient's illness would not require services sufficiently complex to be deemed skilled care if he were at a medical facility, the patient would not be entitled to any Medicare benefits, just as a medical institution patient would not be so entitled. Therefore, section 4454 extends to RNHCI patients only those benefits that they could have received if they had sought treatment at a medical institution, and then only a subset, i.e. the nonmedical portion, of those benefits.

Thus, while the fact that section 4454 does not require the involvement of medical personnel in RNHCI-provided care may render such care "custodial" under the regulations, it does not confer upon RNHCI patients any special benefit. RNHCI patients, just like medical patients, may not be reimbursed for services that, if performed in a medical facility, would not constitute skilled care. *See* 42 U.S.C. § 1395y(a)(9) (excluding custodial care from Medicare coverage for both medical institution and RNHCIs). RNHCI patients are thus never reimbursed for services for which medical patients are not similarly

reimbursed. The only distinction is that the services provided by RNHCIs are not dispensed under professional medical supervision, a distinction that Congress found necessary to accomplish its purpose of accommodating individuals who have religious objections to medical care.

That section 4454 does not confer a special benefit upon RNHCI patients is perhaps best demonstrated by a more tangible illustration. Suppose, for example, that two patients with similar health problems sought care at the facilities of their choice, with A attending a medical institution, and B an RNHCI. While at their respective institutions, both A and B receive the same basic physical nursing services, such as changing of bed pans and assistance with eating and bathing. A, however, receives these services along with medical services as part of an integrated plan of skilled care that requires professional supervision, while B receives only the nonmedical care services. Under the Medicare Act, A would be reimbursed for both the medical and the nonmedical services. Under section 4454, B, who had the very same condition as A, would also be reimbursed, although only for the limited, nonmedical care that he received.

On the other hand, if A's health problems are such that he needs only general assistance in eating and bathing, with no overriding health concerns requiring medical supervision, he would not be reimbursed by Medicare for any of the care that he received. Likewise, B, again suffering from the same affliction as A and receiving the same physical nursing services, would not be reimbursed for such services because, under 42 U.S.C. § 1395i-5(a)(2), B did not have "a condition such that [he]

would qualify for benefits" if he were in a medical institution. Thus, section 4454 does not confer a special benefit upon individuals who are religiously opposed to medical treatment, but rather merely allows them to be reimbursed for a subset of those services for which they would be reimbursed if they had sought treatment at a medical institution. Although such services technically may be "custodial," in that medical professionals are not involved, the fact remains that the benefits received by such individuals are not in any way special, or above and beyond those which medical patients receive.[8]

Section 4454 does not in any other way impermissibly benefit the religious cause of individuals who object to medical care. Section 4454 does not create any more of an incentive for persons to engage in religion than other religious accommodations that have been upheld by the Supreme Court. *See Amos*, 483 U.S. at 329-30, 107 S.Ct. 2862 (exemption of religious institutions from Title VII's non-discrimination provisions); *Walz*, 397 U.S. at 666-67, 90 S.Ct. 1409 (exemption of religious organizations from state property tax). Nor does section 4454 benefit religion by providing direct funding for religious activity. Section

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[8] Appellants also argue that RNHCI patients receive a special benefit because coverage decisions regarding RNHCI patients are made by laypersons and without medical examination, thereby making it possible for RNHCI patients to be reimbursed for services that, under medical diagnosis, might have been found to be outside of the scope of Medicare and Medicaid coverage. Because we find that RNHCI coverage decisions are subject to substantial and meaningful review by the Secretary, or her agent, *see* Part II.A.3., we find this argument unpersuasive.

4454 authorizes payment only for "inpatient hospital services or post-hospital extended care services," 42 U.S.C. §§ 1395i-5(a), which are defined as bed and board and such other physical care services that are ordinarily furnished by health care facilities, *see* 42 U.S.C. §§ 1395x(b); 1395x(h). Thus, Medicare and Medicaid do not fund the spiritual healing services that may take place within RNHCIs. *See Medicare and Medicaid Programs*, 64 Fed.Reg. 67,028, 67,044 (1999) ("Neither Medicare nor Medicaid will pay for any religious aspects of care provided in [RNHCIs].").

Finally, section 4454 does not cause government aid to flow to "pervasively sectarian institutions," the funding of which constitutes an improper benefit to religion. *See Bowen v. Kendrick*, 487 U.S. 589, 609-610, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). A pervasively sectarian institution is one in which religion so pervades its functions that any government aid it receives, even if designated for secular activities, impermissibly assists religion because the institution is unable to separate the funded secular activities from its religious mission. *See id.*; *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 753-54, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). Conversely, an institution is not pervasively sectarian if its primary function is secular and if this function can be effectively separated from its religious activity. *See id.* at 755, 96 S.Ct. 2337. As so defined, we cannot say that RNHCIs are pervasively sectarian.

The primary function of RNHCIs, by definition, is to provide "nonmedical items and services to inpatients on a 24-hour basis" through "nursing personnel who are experienced in caring for the physical needs of [RNHCI] patients." *See* 42 U.S.C. §§ 1395x(ss)(D), (E). Because these physical care services, such as dressing of wounds and

assistance in eating, are inherently secular, *see Lemon*, 403 U.S. at 616-17, 91 S.Ct. 2105, and "are not converted into [religious activities] by the fact that they are carried out by organizations with religious affiliations." *Bowen*, 487 U.S. at 613, 108 S.Ct. 2562, the primary function of RNHCIs is secular in nature. Furthermore, nothing in section 4454 suggests that these physical care services cannot be separated from the prayer and other religious activities that may occur within RNHCIs. Accordingly, because RNHCIs are not pervasively sectarian institutions, their receipt of government funding does not impermissibly benefit religion.

In sum, section 4454 does not in any way confer a special benefit upon religion.

3.

The third part of the *Lemon* test requires that the law not foster excessive government entanglement with religion. Appellants contend that section 4454 violates this part because it effectively delegates Medicare and Medicaid coverage decisions to RNHCIs in violation of *Larkin v. Grendel's Den, Inc.*, in which the Supreme Court struck down a law granting churches discretionary authority over the issuance of liquor licenses. *See* 459 U.S. 116, 126-27, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). Appellants argue that section 4454 effects a similar delegation because it permits RNHCI utilization review committees, which are composed of lay persons who are religiously opposed to medical care, to make admissions and other coverage decisions that are not based on medical examination or diagnosis and that, according to appellants, are largely insulated from governmental review. Whatever

merit this argument might have if RNHCIs in fact held ultimate decision-making authority regarding Medicare and Medicaid coverage, we do not believe that section 4454 grants RNHCIs such authority, either on its face or in effect.

Section 4454, by its terms, makes clear that an RNHCI offers only an initial recommendation regarding Medicare and Medicaid coverage. *See* 42 U.S.C. §§ 1395x(ss)(1)(H)–(J), 1395x(ss)(3)(B)(ii). This recommendation must contain information regarding the RNHCI's coverage determination and any other information that the Secretary may deem necessary to effectively review the RNHCI's decision. *See* 42 U.S.C. §§ 1395x(ss)(1)(I)–(J). The Secretary, typically acting through a fiscal intermediary in the form of a private insurance company, then reviews the RNHCI's recommendation to finally determine whether the patient is entitled to Medicare or Medicaid benefits for the services provided by the RNHCI. *See* 42 U.S.C. §§ 1395x(ss)(1)(H)–(J), 1395x(ss)(3)(B)(ii). Thus, section 4454 expressly provides for governmental review of RNHCI coverage decisions and establishes a procedure to achieve this end.

Furthermore, the governmental review required by section 4454 is, in our view, substantial. First, we are confident that the Secretary has access to sufficient information to conduct a meaningful review of an RNHCI's coverage recommendation. Although the Secretary cannot require RNHCI patients to undergo a medical examination to assist her in her review, *see* 42 U.S.C. § 1395x(ss)(3)(A)(i), she is authorized to obtain any other information that she believes to be necessary to perform her evaluation, *see* 42 U.S.C. § 1395x(ss)(3)(A)(ii). Indeed, the Secretary is expressly empowered to deny Medicare

and Medicaid benefits to an RNHCI patient if any information requested is not provided. See id. Second, we see no reason to question the soundness of Congress's judgment that the Secretary generally will be able to make a competent coverage determination based upon the non-medical information available to her. That the Secretary's evaluation may be made more difficult by the lack of medical data does not render her review illusory. Section 4454 requires RNHCIs to make reasoned coverage recommendations that are subject to meaningful governmental review. This stands in stark contrast to the decision-making authority present in Larkin, where the church possessed authority that "call[ed] for no reasons, findings, or reasoned conclusions," and which was subject to no review whatsoever. Larkin, 459 U.S. at 125, 127, 103 S.Ct. 505. We thus conclude that section 4454 does not impermissibly delegate authority to RNCHIs in violation of the third part of the *Lemon* test.

In sum, we agree with the district court that section 4454 constitutes a permissible accommodation of religion.

III. As Applied Challenge to Section 4454

Appellants also argue that, even if not unconstitutional on its face, section 4454 violates the Establishment Clause as applied to Christian Science sanitoria. Appellants contend that section 4454 benefits the Christian Science sect in violation of the second part of the *Lemon* test because it authorizes direct funding of Christian Science sanitoria, institutions that appellants claim to be pervasively sectarian in nature. An institution is not pervasively sectarian, however, if its primary function is

secular and if this function can be effectively separated from the institution's religious activity. *See Roemer*, 426 U.S. at 755, 96 S.Ct. 2337. Because we find that Christian Science sanitoria possess both of these qualities, we conclude that Christian Science sanitoria, like all RNHCIs, are not pervasively sectarian.

First, the primary function of Christian Science sanitoria is secular in nature. Christian Science sanitoria predominantly provide physical nursing services to sick individuals. *See* Ruth Anne Cook Aff. ¶ 16 (Christian Science nurses bathe patients, wash and bandage sores, change bed pans, and assist patients in dressing and walking).

Although Christian Science nurses administer these services with the hope that they will assist the spiritual healing process, a religious motivation on behalf of a party providing secular services does not transform such services into religious activity. *See Bowen*, 487 U.S. at 613, 621, 108 S.Ct. 2562. Thus, the primary function of Christian Science sanitoria – the provision of physical nursing services – is secular. Second, the physical services provided by Christian Science sanitoria are distinct and separable from any religious activity that may take place within such facilities. Just as the provision of health services in religious schools does not have the primary effect of aiding religion, *see Wolman v. Walter*, 433 U.S. 229, 242, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), no more so does the administering of mundane physical services in Christian Science sanitoria. Accordingly, we reject appellants' as applied challenge to section 4454.

App. 31

Conclusion

For all of the reasons set forth above, we affirm the judgment of the district court.

LAY, Circuit Judge, dissenting.

I respectfully dissent.

The basic deficiency of the majority opinion is that it upholds the constitutionality of a statute which provides a government benefit solely to religious institutions and their adherents. I am aware of no other decision in the United States which has upheld such a program. As the Supreme Court observed in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985):

> This unyielding weighting in favor of [a particular faith] over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:
>
> > "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." (citation omitted).

The fundamental principle underlying the First Amendment's Establishment Clause is government neutrality toward religion. *See Everson v. Board of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (government should not "pass laws which aid one religion, aid all religions, or prefer one religion over another."). While the Medicare and Medicaid provisions at issue are veiled in textual neutrality, it is well-settled that facial neutrality of a law is not dispositive; rather, a court must examine a

law's form and effect. *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (striking down ordinances which targeted the religious activity of animal sacrifice practiced by the Santeria religion). When the form and effect of the Medicare and Medicaid provisions are examined, it becomes clear that they are an abandonment of the fundamental principle of neutrality and merely serve to replicate the unconstitutional provisions struck down in Children's Healthcare is a *Legal Duty, Inc. v. Vladeck*, 938 F.Supp. 1466 (D.Minn.1996) (CHILD I). In the face of an Establishment Clause challenge there are two possible tests: 1) the three-prong test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)*; and 2) the stricter

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* A number of Supreme Court Justices have expressed doubts about the continued utility of *Lemon*. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring) (noting that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . and a sixth has joined an opinion doing so.") Despite this, in 1997, the Supreme Court invoked *Lemon* to overrule a prior decision which held that the Establishment Clause barred the city from sending public school teachers into parochial schools to provide remedial education. *See Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). *Agostini* served both to reaffirm the general principles of *Lemon* and to slightly alter its landscape by merging two of its prongs. Post-*Agostini*, an Establishment Clause challenge follows these steps: 1) the government must act with secular purpose; and 2) the government action must not have as its primary effect the advancing or inhibiting of religion. The analysis of prong two is then further broken down into three steps: a) whether aid results in government indoctrination; b) whether aid recipients are defined by reference to religion; and c) whether excessive

standard of review articulated in *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), for laws which facially discriminate among religions. The Medicare and Medicaid provisions at issue exhibit denominational preference such that strict scrutiny is required; regardless, even if one accepts the majority's position that *Larson* is inapplicable, the statutes are unconstitutional under *Lemon*.

I. STRICT SCRUTINY

In *Larson*, the Court stated that "when we are presented with a . . . law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." 456 U. S. at 246, 102 S.Ct. 1673. Under *Larson*, a law that makes explicit and deliberate distinctions between religious organizations must be closely fit to the furtherance of a compelling government interest. *See id.* at 246-47, 102 S.Ct. 1673. Critically, the law at issue in *Larson* did not name any particular religious group. The Court looked beyond this, however, and examined

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entanglement between government and religion is created. The majority concludes that *Agostini*'s revision of *Lemon* is inapplicable to accommodation cases. Because the majority follows the traditional *Lemon* analysis, this dissent will rebut that analysis. Nonetheless, while *Agostini* is factually distinguishable from the instant case, it remains the Court's most recent pronouncement on the proper application of *Lemon*, and its terms ought not be so easily displaced. Regardless, whether one applies the traditional *Lemon* analysis or its revision under *Agostini*, the provisions in this case fail.

the law's intent and legislative history and found it demonstrated a denominational preference for older, more established churches. *See id.* at 255, 102 S.Ct. 1673. Thus, a law can "facially discriminate" among religions even when it does not expressly distinguish by sect name. To determine whether strict scrutiny applies, a court looks at a law's text, legislative history, and real operation. *See Church of the Lukumi Babalu Ayr*, 508 U.S. at 533-35, 113 S.Ct. 2217.

The majority errs in holding that the provisions here do not reveal facial differentiation of religious sects. Admittedly, the Medicare and Medicaid provisions do not specifically name any religious sect; however, every other indicator reveals that these provisions are far from neutral and that they have as their object a denominational preference for Christian Scientists.

A. Legislative History of Section 4454

From their very inception, the Medicare and Medicaid provisions have reflected explicit and deliberate distinctions among religions. On August 7, 1996, the United States District Court for the District of Minnesota held unconstitutional those portions of the Medicare and Medicaid statutes and regulations which specifically directed benefits to "Christian Science sanitoria." *See* CHILD I, 938 F.Supp. 1466. In direct response to this, Senator Orrin Hatch proposed an amendment to the law entitled "Christian Science Sanitoria." (App. at 108.) This amendment stated that, as a result of CHILD I, "unless [Medicare/Medicaid] is changed, large numbers of Christian Scientists who have paid into Medicare for over 30 years

will be denied access to the benefits they reasonably expected for care provided in Christian Science nursing care facilities." (*Id.*) Thus, it is clear that the sole impetus for the present law was the alleged plight of Christian Scientists.

The Senate Finance Committee approved Senator Hatch's amendment, and the proposal was eventually embodied in section 4454 of the Balanced Budget Act of 1997 (section 4454). Section 4454 substituted the words "religious nonmedical health care institution" (RNHCI) for each reference to "Christian Science sanatorium" which had been struck by CHILD I. During the debate on the Balanced Budget Act of 1997, Senator Kennedy spoke in favor of section 4454, stating:

> When Medicaid and Medicare were enacted over 30 years ago, Congress included a special provision granting a religious accommodation for members of the church. . . . For 30 years, the Christian Science Church relied on Medicare and Medicaid benefits and built a health care system that assists thousands of men and women.
>
> . . . .
>
> This [amendment] meets the worthwhile goals of the original Medicare and Medicaid laws, while meeting constitutional concerns. It deserves to be enacted into law so that the needed benefits will continue to be available.

143 Cong. Rec. S6301-02, S6321-22 (daily ed. June 25, 1997) (emphasis added). On July 31, 1997, Senator Hatch, discussing section 4454, expressed concern over the recent decision in CHILD I, and stated:

> Mr. President, I would like to turn now to another provision, the need for which was brought to my attention by Ms. Michelle Newport, a Christian Scientist in Salt Lake City, UT.

Under several provisions of Medicare and Medicaid law, reimbursement has been authorized for literally decades for nonmedical hospital and skilled nursing facility services provided in sanitoria operated by the First Church of Christ, Scientist. 143 Cong. Rec. S8415-01, S8447 (daily ed. July 31, 1997).

Additionally, the House Conference Report on section 4454 reveals Congress' interest in "continuing" benefits to Christian Scientists. The Report provides: The conference agreement continues the provision of needed nonmedical nursing services to poor and elderly Americans who have contributed to the Medicare and Medicaid systems, without requiring them to violate their sincerely held religious beliefs. . . . The conference agreement replaces [the provisions struck down in Child I] with a sect-neutral accommodation available to any person who is relying on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs. . . .

. . . .

[The agreement] avoids the unfairness of requiring these Americans to pay taxes . . . for years without being able to receive any benefits. The Conferees believe it would be particularly harsh to cut off nursing benefits for poor and elderly men and women who have not made alternative arrangements for financing their health care

and who now rely on the availability of nonmedical nursing benefits at a time when other patients receive reimbursement for hospital care.

H.R. Conf. Rep. 105-217 (emphasis added).

Admittedly, the legislative history of section 4454 includes some language implying an intent to accommodate a broad class of religious objectors. The majority relies on this apparent breadth and finds the legislative history demonstrates an intent to benefit all persons "who embrace spiritual healing over medical treatment" and reveals no evidence of an intent to include only Christian Scientists. Such conclusion ignores the clear theme underlying every aspect of the legislative history – Congress sought to "continue" the benefits that previously existed. Those prior benefits were specifically and solely directed to Christian Scientists. In essence, Congress designed section 4454 to fit precisely into the gap left by CHILD I. In 1997, Congress' approach to providing these benefits was certainly more sophisticated than the original provisions; however, "[t]he Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on Constitutional protections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (quoting *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 83 L.Ed. 1281 (1939)).

The legislative history in this case reveals a specific intent to solely benefit Christian Scientists. Congress' incredibly narrow crafting of the new provisions leaves no doubt regarding their lack of neutrality and denominational preference for Christian Scientists.

B. The Actual Effect of Section 4454

As the Supreme Court has observed, further evidence of a law's object can be found by analyzing its actual effect. *See id.* at 535, 113 S.Ct. 2217 ("[a]part from the text, the effect of a law in its real operation is strong evidence of its object.") In practice, the statutes at issue encompass only Christian Science sanatoria. Under 42 U.S.C. § 1395x(ss)(1)(C), RNHCI benefits must be received in an institution that provides "only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs." Further, 42 U.S.C. §§ 1395x(ss)(1)(D) and (G) exclude from the definition of RNHCI institutions that employ medical personnel or that affiliate with medical organizations. Despite the breadth of this language, no party has been able to point to any group beyond Christian Science sanitoria that presently qualify under the RNHCI provisions. Thus, the real operation of section 4454 continues to select only Christian Science sanatoria for a special benefit.

The actual effect of section 4454 closely parallels that of Chapter 390 in *Grumet v. Pataki*, 93 N.Y.2d 677, 697 N.Y.S.2d 846, 720 N.E.2d 66 (1999), cert. denied, ___ U.S. ___, 120 S.Ct. 363, 145 L.Ed.2d 284 (1999) (*Kiryas Joel III*). In *Kiryas Joel III*, the New York Legislature attempted, for the third time, to establish a public school district for the benefit of disabled children in the Village of Kiryas Joel. Village residents strictly adhere to Satmar Hasidism. The latest incarnation of the school district law used wholly secular language; the court, however, found "[a]lthough chapter 390 sets forth facially neutral criteria, any attempt

to characterize the statute as a religion-neutral law of general applicability is belied by its actual effect." *Id.* at 72. The actual effect of Chapter 390 allowed the Village of Kiryas Joel and only one other municipality to benefit. The court found that Chapter 390 was crafted "in such a way that permits the statute's benefits to flow almost exclusively to the religious sect it was plainly designed to aid." *Id.* at 73. The same must be said of section 4454.

The majority does not contest the idea that only Christian Science sanatoria qualify as RNHCIs. The majority argues, however, that "a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn." *Gillette v. United States*, 401 U.S. 437, 452, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (finding exemption from draft for conscientious objectors had valid, neutral reasons for limitation to objectors of "war in any form"). The majority then identifies the criteria for RNHCIs and articulates possible secular purposes for each criterion. While each aspect of the new law may appear to be neutral when taken independently, as a whole it is clear that section 4454 only identifies Christian Science sanatoria. The neutrality of the words in isolation cannot camouflage the lack of neutrality of the whole. It is apparent that the definition and qualifying criteria, though not entirely devoid of secular bases, are drawn to benefit a single sect. Additionally, appellees argue that the fact that no one else presently qualifies is not evidence of section 4454's lack of neutrality. I disagree. That only one religious organization can currently be identified accentuates the suggestion that the criteria were carefully and tightly

drawn with an intent to solely benefit Christian Scientists. Thus, section 4454's legislative history and its actual effect point to its underlying denominational preference. In light of this, this court should have analyzed the statutes under *Larson*'s rule of strict scrutiny. In so doing, the law, on its face, demonstrates there exists no compelling interest in providing special benefits to adherents of a particular religious sect. Thus, I would hold section 4454 to be unconstitutional.

II. *LEMON* ANALYSIS

Assuming, arguendo, that *Larson* does not apply, section 4454 still fails under *Lemon*. In *Lemon*, the Court established a three-prong analysis: a law must 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive government entanglement with religion. 403 U.S. at 612-13, 91 S.Ct. 2105.

A. Secular Purpose

To satisfy the first prong of *Lemon*, a statute must have a secular purpose. As was noted above, the legislative history of section 4454 reveals a purpose to "continue" the benefits previously provided to Christian Scientists, or, if one accepts the majority's interpretation, the legislative history reveals an intent to benefit all religious objectors to medical care. In either case, such purpose is not secular. The Supreme Court has recognized, however, that accommodation of religion, i.e. the alleviation of significant governmental interference with

the exercise of religion, can constitute a permissive secular purpose. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (upholding application of religious exemption to Title VII's prohibition of religious discrimination in employment). Critically, however, while there can be constitutionally permissive accommodations beyond what is required by the Constitution, "accommodation is not a principle without limits." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (*Kiryas Joel I*) (concluding that singling out the Kiryas Joel community for special treatment violated the principle of neutrality to which all accommodations must adhere). As Judge Murphy eloquently noted: "[a]n asserted motivation of religious accommodation . . . cannot shield governmental actions that otherwise violate the principle of neutrality embedded in the establishment clause." *Stark v. Independent Sch. Dist., No. 640*, 123 F.3d 1068, 1079 (8th Cir.1997) (Murphy, J. dissenting), cert, denied, 523 U.S. 1094, 118 S.Ct. 1560, 140 L.Ed.2d 792 (1998). Despite Judge Murphy's wise counsel, today's majority seems to allow the rallying-cry of "accommodation" to rule the day

The majority holds that section 4454 properly accommodates religion. As the starting point for its accommodation analysis, the majority relies on *Sherbert v. Verner*, 374 U.S. 398, 399 n. 1, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (reversing denial of benefits to Sabbatarian who refused to work on Saturday after noting there is no "doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible"),

and *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (reversing denial of unemployment benefits to Jehovah's Witness who refused to make military equipment, noting that "petitioner terminated his work because of an honest conviction that such work was forbidden by his religion."). The majority states section 4454 removes "a special burden imposed by the Medicare and Medicaid Acts upon persons who hold religious objections to medical care." The majority contends that without section 4454, individuals who object to medical care are burdened because they are forced to choose between adhering to their religious beliefs and foregoing health care, or violating their beliefs and receiving care. The majority then concludes this "burden" is comparable to that of *Sherbert* and *Thomas* and justifies an accommodation.

The majority's analysis is flawed in two ways. First, any "burden" present in this case is not of the kind that accommodation theory was designed to remedy. Second, even if a proper burden existed, the "accommodation" provided goes beyond what is constitutionally permissible and is instead an establishment of religion.

In *Gillette*, the Court upheld that section of the Military Selective Service Act exempting people conscientiously opposed to participation in war in any form. The Court stated that " '[n]eutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties. . . . " 401 U.S. at 454, 91 S.Ct. 828 (internal citations omitted) (emphasis added). In *Amos*, in the face of an Establishment Clause challenge, the Court upheld Section 702 of the Civil Rights Act of 1964, which

allowed certain religious employers to discriminate on the basis of religion. The Court found this exemption had the purpose and effect of "alleviating significant governmental interference" with the exercise of religion. 483 U.S. at 339, 107 S.Ct. 2862 (emphasis added). These two cases present religious accommodation as a method of removing significant governmental burdens on the free exercise of religion. In contrast, the facts of the present case reveal that the statutory provisions at issue benefit, as opposed to, burden certain religious adherents.

The majority's conclusion that a "burden" exists is based on a basic misunderstanding of Medicare and Medicaid. These programs form a framework through which government provides the secular benefit of medical care. The statutory scheme allows reimbursement for expenses for reasonable in-patient hospital expenses, post-hospital care services, and post-hospital home care expenses. Critically, Medicare and Medicaid do not cover all health care services, but only those that are "reasonable and necessary for the diagnosis or treatment of illness or injury. . . . " 42 U.S.C. § 1395y(a)(1)(A). Thus, reimbursement of personal nursing care is only allowed when it is an integral component of medical care. Without section 4454, religious objectors to medical care are denied reimbursement for nonmedical personal nursing care because they decline to accept the very benefit (medical care) for which any reimbursement of such care must be a part. This choice to decline a benefit is not a "burden." As is stated in the opening of this dissent, no other decision has ever upheld government benefits solely because of religious belief. The majority fails to recognize the fundamental and significant difference between the affirmative

award of government benefits to religious adherents and a government exemption designed to alleviate a burden.

The logic employed by the majority would allow nearly anything to be deemed a burden so as to permit an accommodation. For example, states fund public education. Religious individuals choose not to accept such education for religious reasons. The states' funding of public education includes funds for textbooks which are integral to the process of public education. Under the majority's reasoning, a religious group with an independent education system could assert that the states' failure to pay for their tuition and textbooks is a burden such that a legislative accommodation would be permissible. Such logic is both strained and unconstitutional.

Even if a proper burden existed, section 4454 far exceeds a constitutionally permissible accommodation. While the Supreme Court has not specifically defined the test for evaluating accommodations, at minimum, an accommodation cannot benefit only particular religions or benefit all religions but not nonreligious organizations. In *Estate of Thornton v. Caldor,* the Court struck down a Connecticut statute which provided Sabbatarian employees with an absolute right not to work on their Sabbath without losing the right to their unemployment benefits. The Court found the law impermissibly gave Sabbatarians privileges that were not available to others who had legitimate but non-religious reasons for missing weekend work. *See Caldor,* 472 U.S. at 710 n. 9, 105 S.Ct. 2914. In *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), Texas exempted religious periodicals from its sales tax. The Court observed that while

it had previously upheld statutes which directed governmental benefits to religions, in those cases "the benefits derived by religious organizations flowed to a large number of nonreligious groups as well." *Id.* at 11, 109 S.Ct. 890. The Court cautioned that it "would not have hesitated to strike them down for lacking a secular purpose and effect" if only certain religious organizations had benefitted. *Id.* The benefit at stake in section 4454 flows only to Christian Science sanatoria. As such, even if a burden existed, section 4454 violates the Court's proscription against benefitting only certain religious organizations and, thus, cannot be a proper accommodation.

B. Primary Effect

Under *Lemon*, a statute cannot have as its primary effect the advancement or inhibition of religion. This effects prong has been interpreted to mean that government action cannot have the effect of endorsing religion. In *County of Allegheny v. ACLU*, 492 U.S. 573, 592, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the Court noted, "[i]n recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." In *Texas Monthly*, focusing on the breadth of the benefitted class, the plurality stated:

> when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed

> deterrent to the free exercise of religion . . . it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Texas Monthly, 489 U.S. at 14, 109 S.Ct. 890 (quoting *Amos*, 483 U.S. at 348, 107 S.Ct. 2862 (O'Connor, J. concurring)). Thus, statutes are an unconstitutional endorsement of religion when they provide a benefit to one community that is not equally provided to others. *See Kiryas Joel I*, 512 U.S. at 703-04, 114 S.Ct. 2481. Section 4454 does just this.

Medicare expressly excludes reimbursement for "custodial care." 42 U.S.C. § 1395y(a)(9). Custodial care is defined as "any care that does not meet the requirements for coverage as [skilled nursing] care. . . . " 42 CFR 411.15(g). "Skilled nursing" care is defined as services that are ordered by a physician, require the skills of technical or professional personnel, and are furnished by or under the supervision of such personnel or physician. *See* 42 CFR 409.31. Further, the regulations of "skilled nursing facilities" provide that, to be considered a skilled service, it "must be so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel," 42 C.F.R. § 409.32(a). Personal care services, such as administration of routine oral medication, eye drops, ointments, changing dressings, and routine care of incontinent patients, are generally not skilled services and are excluded from reimbursement under the "custodial care" exception. *See* 42 C.F.R. § 409.33(d).

An RNHCI is defined in 42 U.S.C. § 1395x(ss)(1) as an institution that provides only nonmedical nursing items and services exclusively to religious medical objectors practicing religious healing and uses only nonmedical personnel, Further, an RNHCI, by definition, has institutional religious beliefs against providing medical care, examination, diagnosis, prognosis, or treatment, and can have no affiliation with medical providers. *See id.*

Under the very definition provided, it is readily apparent that the services provided in an RNHCI cannot meet the requirements for skilled nursing services and are instead custodial services. Consequently, such care should be excluded from reimbursement. By giving benefits to certain religious groups which are unavailable to others, section 4454 unconstitutionally places the imprimatur of government on the Christian Science faith.[10]

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[10] The record in this case reveals that not only is improper custodial care being provided and reimbursed at RNHCIs, but the services provided are themselves sectarian in nature. In general, Christian Science nurses care for bodily needs, bandage wounds, and help patients move about the sanatorium, while Christian Science practitioners administer prayer-healing. There is significant evidence in the record, however, that the nurses, who are present on site and paid by RNHCIs, are practicing faith healing in the sense of giving support to practitioners. For example, there is evidence in the form of affidavits from nurses discussing their religious training and indicating they provide services such as Bible reading and prayer. *See* e.g. Affidavit of Ruth Anne Cook (App. at 178-187), Appellees are quick to point out that the practitioners are the ones who truly promote Christian Science faith healing and that they are not paid by the Medicare benefits. The facts reveal, however, that sectarian services are being provided by nurses.

The majority does not dispute that the care provided in RNHCIs fits within the definition of "custodial care." Rather, the majority tries to distinguish RNHCI care from mere custodial care by noting that 42 U.S.C. § 1395i-5(a)(2) provides that payments are made for services furnished to an individual in an RNHCI only if "the individual has a condition such that the individual would qualify for benefits . . . if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not an [RNHCI]." The majority asserts that this provision ensures that an RNHCI patient will only be reimbursed if his or her illness is such that he would have received skilled care in a medical institution and thus, such patient is not receiving anything "special" but is instead receiving merely a "subset" of benefits.[11]

The majority's reasoning defies sensibility. To assert that RNHCI benefits are a "subset" of medical benefits is a categorical error. The entire nature of Medicare and Medicaid is to provide medical services in a manner managed by medical criteria and qualifications and governed by the medical profession. RNHCIs and the care they provide are, by definition, "nonmedical." That which is defined as not being X cannot logically be a subset of X. Admittedly, certain "nonmedical" care is necessary for the furtherance of medical care; however,

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Thus, the statutory scheme allows Medicare payments to support the practice and furtherance of faith healing.

[11] The majority's reliance on this provision is misplaced. This provision is intricately related to the unconstitutional delegation of authority at play in this case, an issue more thoroughly discussed in Section C below.

reimbursement for such nonmedical care was never intended to be a stand-alone benefit. Nonmedical aspects of care, such as room and board, are covered only as incidents of medical care. Allowing RNHCI's to receive reimbursement for nonmedical services as a stand-alone benefit has the effect of endorsing religion.

The majority provides a hypothetical in the hopes of elucidating its argument; but the comparison provided is malapropos. The majority compares two patients, one in an RNHCI and one in a medical facility, and argues that they will always receive the same care with the patient in the medical facility merely receiving more care. The difficulty with this comparison is that it compares medical care to nonmedical care. A more apt comparison is between those groups receiving stand-alone nonmedical services, RNHCI patients receive stand-alone nonmedical services and are reimbursed for them because of their specific religious beliefs; non-religious objectors and custodial care patients receive stand-alone nonmedical services and are not reimbursed for them because of their lack of specific religious beliefs. This comparison reveals that the receipt of stand-alone nonmedical benefits is a special benefit to a single religious group, As such, it violates the effects prong of *Lemon*.

C. Excessive Entanglement

The third prong of the *Lemon* analysis requires that a law not foster excessive entanglement of government and religion. In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), the Court struck down a Massachusetts statute granting religious bodies veto

power over applications for liquor licenses. The Court held that the statute violated the neutrality principle in two ways: 1) by fusing governmental and religious functions through the delegation of important discretionary governmental powers to religious bodies; and 2) by lacking any effective guarantee that the delegated power would be used for secular, neutral purposes. *See id,* at 125-26, 103 S.Ct. 505. In *Kiryas Joel I,* the Court stated that the statute creating the Kiryas Joel school "depart[ed] from [the] constitutional command [of the Establishment Clause] by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." *Kiryas Joel I,* 512 U. S. at 696, 114 S.Ct. 2481. In essence, the prohibition on excessive entanglement minimally means "a State may not delegate its civic authority to a group chosen according to a religious criterion." *Id.* at 696-97, 114 S.Ct. 2481. *See also Barghout v. Bureau of Kosher Meat and Food Control,* 66 F.3d 1337, 1342 (4th Cir.1995) (striking an ordinance that made it a misdemeanor to offer for sale, food falsely labeled as kosher because the statute fostered excessive entanglement "by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect."). The statutory scheme at issue in this case violates this principle. The provisions allow the initial decision regarding medical necessity to be made at the RNHCI and initially reviewed by the RNHCI's utilization review committee. Admittedly, the statutes purportedly vest final decision-making authority in the Secretary of Health

and Human Services (Secretary). The majority relies on this "ultimate decision-making authority" to overcome any entanglement difficulties. There are, however, two pitfalls to the review provisions.

First, the initial decisions are made by individuals wholly opposed to medical care. In his dissent in *Bowen v. Kendrick*, 487 U.S. 589, 636, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), Justice Blackmun noted that, "asking religious organizations to teach and counsel youngsters on matters of deep religious significance, yet expect[ing] them to refrain from making reference to religion is both foolhardy and unconstitutional." It is no less foolhardy to ask an individual opposed to medical care on a religious basis to make a medical determination without regard to religion. This case, however, presents an even more outrageous hypothesis. The Christian Science faith not only opposes medical care; it altogether denies the reality of pain and disease. *See* MARY BAKER EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES (1991). Thus, the statutes here delegate the initial "diagnosis" of medical status to untrained laypersons who deny the reality of medical need. This is beyond foolhardy.

Second, while the statutory scheme allows for administrative review of the RNHCI's initial determination, such review is constrained. For example, the statutes provide that the Secretary cannot require "any patient of [an RNHCI] to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient . . . , objects thereto on religious grounds," 42 U.S.C. § 1395x(ss)(3)(A)(i), and the Secretary cannot subject an RNHCI or its personnel "to any medical supervision, regulation, or

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Children's Healthcare is a Legal Duty, Inc., *et al.*,

Plaintiffs,

vs.

Nancy-Ann Min DeParle, *et al.*,

Defendants,

The First Church of Christ Scientist, in Boston, Massachusetts,

Defendant-Intervenor.

MEMORANDUM OPINION AND ORDER

Civ. No. 97-1794 (ADM/JGL)

(Filed July 24, 1998)

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INTRODUCTION

The above-entitled matter came on for hearing before the undersigned United States District Judge on April 17, 1998, pursuant to Plaintiff's motion for summary judgment and Defendants' and Defendant-Intervenor's cross motions for summary judgment. Plaintiffs challenge the constitutionality of seven sections of the Medicare and Medicaid statutes that grant exemptions from program requirements for religious non-medical health care institutions ("RNHCIs"). Complaint, ¶ 10. Plaintiffs seek declaratory and injunctive relief on the basis that the relevant Medicare and Medicaid provisions violate the Establishment Clause of the First Amendment of the United States Constitution.

BACKGROUND

The Medicare Act, 42 U.S.C. §§ 1395 *et seq.*, establishes a system of comprehensive health insurance for the disabled and the elderly. The Act provides hospital care, post-hospitalization care by nursing facilities, home health care, and hospices. 42 U.S.C. § 1395c. The funding for medical care under the Act is generated through federal income taxes under both the Self-Employment

Contributions Act and the Federal Insurance Contributions Act ("FICA").

The Medicaid Act, 42 U.S.C. §§ 1396 *et seq.*, allows participating states "to furnish (1) medial assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care. . . . " 42 U.S.C. § 1396. Pursuant to the statutes, states must submit a plan which provides for coverage of basic medical services and, depending on the state, a variety of other health care services. 42 U.S.C. §§ 1396a; 1396d.

The Balanced Budged Act of 1997, which was signed into law by President Clinton on August 5, 1997, contains amendments to the Medicare Act and Medicaid Act that allow people to choose religious institutions for the provision of nonmedical nursing care and that provide exemptions to RNHCIs from requirements such as licensing, peer review, and other quality control mechanisms. Plaintiffs contend that these amendments and exemptions, as codified by the Balanced Budget Act of 1997, are unconstitutional under the Establishment Clause.

In 1996, the same parties were engaged in a similar lawsuit before United District Judge Richard H. Kyle, *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, ("CHILD I"), 938 F.Supp. 1466 (D. Minn. 1996). The medicare and Medicaid provisions at issue in *CHILD I*, unlike the relevant provisions in the instant case, created exemptions specifically for "Christian Science sanitoria." As

such, the benefits attendant to the exemptions were available only to Christian Scientists. Because the statute was sect-specific, Judge Kyle held that the Medicare and Medicaid amendments at issue violated the Establishment Clause. In response to Judge Kyle's decision, Congress amended the statutes, substituting "religious nonmedical healthcare institutions" for the explicit, targeted references to "Christian Science sanitoria." Plaintiffs challenge the new amendments on the grounds that the changes had no real impact, because the only institutions that qualify for the exemptions under the new criteria are Christian Science sanitoria.

First, Plaintiffs challenge the inclusion of RNHCIs in the Medicare Act's definition of "hospital" in 42 U.S.C. § 1395x(e), which states:

> The term "hospital" also includes a religious nonmedical health care institution (as defined in subsection (ss)(1)), but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations consistent with section 1821.

42 U.S.C. § 1395x(e), as amended by Pub. L. 105-33 § 4454(a)(1)(A), 111 Stat. 426. A comparable amendment, section 4454(a)(1)(B), also substitutes "religious nonmedical health care institution" for the language "Christian Science sanitoria" in the context of skilled nursing facilities. *Id.* Congress also substituted the RNHCI language in

sections 4454(b) and (c)(2), making RNHCIs rather than "Christian Science sanitoria" exempt from certain medical standards and medical review requirements normally imposed pursuant to the Medicare and Medicaid Acts. Pub. L. 105-33, § 4454(b) and (c), 111 Stat. 431-432.

Another challenged amendment is the addition of subsection (ss)(1) to 42 U.S.C. § 1395x, which defines the phrase "religious nonmedical health care institution." The criteria include the following: the institution must be a lawfully operated nonprofit organization; the institution must not be owned by or affiliated with a provider of medical treatment or services; and the institution must provide "only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom acceptance of medical health services would be inconsistent with their religious beliefs." The institution must also:

> (D) provide [ ] such nonmedical items and services exclusively through nonmedical nursing personnel who are experienced in caring for the physical needs of such patients;
>
> (E) provide [ ] such nonmedical items and services to inpatients on a 24-hour basis;
>
> (F) on the basis of its religious beliefs, does not provide through its personnel or otherwise medical items and services (including any medical screening, examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients.

Pub. L. 105-33, § 4454(a)(1)(C), 111 Stat 427. To be eligible for such benefits, an individual must elect to receive

benefits from an RNHCI,[1] and the individual must have a medical condition that would qualify that person for inpatient care at a hospital or skilled nursing facility or extended care services associated with such a facility. In other words, to be eligible for RNHCI benefits, an individual must be sick enough that she would require hospital or nursing services if she had no religious objection to those services. Pub. L. 105-33, § 4454(a)(2), 111 Stat. 428-29.

Subsection (ss)(3)(A)(i) limits the extent of medical review or oversight of the RNHCIs. The provisions protect RNHCIs from medical supervision, "insofar as such supervision, regulation, or control would be contrary to the religious beliefs observed by the institution or such personnel." § 4454(a)(1)(C); §(ss)(3)(B)(i). The amendments also provide that "the Secretary shall not require any patient . . . to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient (or legal

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[1] To elect RNHCI benefits, an individual must provide:

(A) A written statement, signed by the individual (or such individual's legal representative), that –

(1) the individual is conscientiously opposed to acceptance of nonexcepted medical treatment; and
(ii) the individual's acceptance of nonexcepted medical treatment would be inconsistent with the individual's sincere religious beliefs.

Pub. L. 105-33 § 4454(a)(2), 111 Stat. 428-29.

"Nonexcepted medical treatment," as defined in subsection 1821(b)(5), includes all medical services, except those that are received involuntarily or required by federal, state or local law.

representative of the patient) objects thereto on religious grounds." *Id.* at §(ss)(3)(A)(i).

DISCUSSION

I. Standard for Summary Judgment

A party is entitled to summary judgment as a matter of law only if it can show that no genuine issue of material fact exists. Fed.R.Civ.P.56(c); *Anderson v. Liberty Lobby Inc.* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514 (1986). The basic inquiry on summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. at 2512.

At the summary judgment stage, the court should not weight the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-1377 (8th Cir. 1997) (citing *Anderson* 477 U.S. at 249, 106 S.Ct. at 2510)). Rather, the court's function is to determine whether a dispute about a material fact is genuine, that is, whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id.* at 1377. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Id.* " 'If reasonable minds could differ as to the import of the evidence,' " summary judgment is inappropriate. *Id.* (quoting *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511).

II. Establishment Clause Challenge

A. The Standard of Scrutiny

The Establishment Clause of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I. The Supreme Court has observed that a "law 'respecting' the prescribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105 (1971). Nevertheless, the central purpose of the Establishment Clause is "ensuring governmental neutrality in matters of religion." *Gillette v. United States*, 401 U.S. 437, 449 (1971).

Supreme Court jurisprudence surrounding the Establishment Clause reflects an understanding that total, absolute separation between church and state is not required. *See, e.g., Lemon*, 403 U.S. at 614 ("some relationship between government and religious organizations is inevitable"). The "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987) (quotations omitted).

In assessing the viability of a law subject to an Establishment Clause challenge, courts have applied the three-pronged test articulated in *Lemon*, which requires that a law must: "(1) reflect a clear secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee v. Weisman*, 505 U.S. 577, 585, 112 S.Ct. 2649,

2654 (1992) (applying the *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971)).[2] In *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673 (1982), the Supreme Court adopted a strict scrutiny test for laws that "facially differentiate [ ] among religions." *Larson v. Valente*, 456 U.S. 228, 246, 102 S.Ct. 1673 (1982). Under the strict scrutiny *Larson* modification, the law must be "closely fitted to the furtherance" of a "compelling government interest" in order to survive an Establishment Clause challenge. *Id.* at 255.

In *Larson*, the Court invalidated a Minnesota statute that allowed an exemption from onerous registration and reporting requirements for those religious organizations that derived more than half of their contributions from members. Although it made no explicit reference to a particular sect or religion, the law reflected a preference for older, more established religious organizations. Consequently, the Court applied strict scrutiny and determined that the law, which was purposely crafted to include some religions and exclude others, was not closely fitted to the furtherance of any compelling governmental interest. *Id.*

In the instant case, Defendants argue that *Larson* is inapplicable because the statute at issue is not facially discriminatory toward particular religions and does not demonstrate the existence of discriminatory intent as was

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[2] It should be noted that the continuing vitality of the *Lemon* test has bee questioned in recent years, but it has never been overruled. *See, e.g., Lynch v. Donnelly*, 464 U.S. 668, 679, 104 S.Ct. 1355, 1362 (1994) (addressing the relationship between *Lemon* and *Larson*).

evident in *Larson*. Unlike the amendments at issue in *CHILD I*, which singled out Christian Scientists, the amendments in this case do not explicitly refer to a certain sect. In interpreting *Larson*, the Supreme Court observed:

> *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*. . . . [The statute in this case] makes no "explicit and deliberate distinctions between different religious organizations," . . . applying instead to all religious entities.

Hernandez v. C.I.R., 490 U.S. 680, 695-96, 109 S.Ct. 2136, 2146-47 (1989) (quoting *Larson*, 456 U.S. at 246-47 n. 23). In *Droz v. C.I.R.*, 48 F.3d 1120 (9th Cir. 1994), the Ninth Circuit Court of Appeals addressed the applicability of the *Larson* standard and the less stringent *Lemon* standard. The court determined that the statute at issue, which denied a Social Security tax exemption to an individual who had religious objections to the welfare system but did not belong to a religious organization, did not violate the Establishment Clause. The plaintiffs in *Droz*, like the Plaintiffs in the instant case, contended that the *Larson* strict scrutiny analysis should apply because the statute "involves disparate treatment of different religious sects." *Id.* at 1124. The Ninth Circuit Court of Appeals distinguished *Droz* from *Larson*:

> Unlike the statute in *Larson*, § 1402(g) is not facially discriminatory. Instead, it grants a religious exemption subject to a condition – coverage in a private welfare plan. The condition is not intended to discriminate among religions, but is intended to ensure the viability of the Social Security system and the coverage of all individuals in a public or private welfare plan. Thus, the *Lemon* test applies.

Id.; *cf. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481 (1994) (applying neither the *Lemon* test nor the *Larson* test explicitly).

Like the statute at issue in *Droz*, the Medicare and Medicaid amendments are not intended to discriminate; to the contrary, the amendments are intended to ensure more egalitarian access to health care benefits. Moreover, the Medicare and Medicaid amendments, like the statute in *Droz* are intended "to ensure the viability of [a public benefits program] and the coverage of all individuals in a public or private welfare plan." *Droz*, 48 F.3d at 1124. Furthermore, unlike the statutory provisions at issue in *CHILD I*, the present amendments do not expressly refer to a religious denomination. For all of these reasons, this Court will apply the *Lemon* test.

B. The *Lemon* Test

The first prong of the *Lemon* test is the requirement that the law reflect a clear secular purpose. The "government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." *Hobbie*, 480 U.S. at 144-45. Indeed, religious accommodation "constitutes a legitimate secular

purpose so long as 'the relevant governmental decision-maker . . . [does not] abandon[ ] neutrality and act[ ] with the intent of promoting a particular point of view in religious matters.' " *Start v. Indep. Sch. Dist., No 640)*, 123 F.3d 1068, 1074 (8th Cir. 1997) (quoting *Corporation of Presiding Bishop of Church of Latter Day Saints*, 483 U.S. 327, 334-35, 107 S.Ct. 2862 (1987)).

In the instant case, the amendments reflect a governmental interest in ensuring that individuals are not forced to choose between: "(1) following their religion and enduring financial hardship; or (2) violating an apparently deeply held belief and receiving Medicare and Medicaid benefits." *CHILD I*, 938 F.Supp. at 1476. A genuine religious belief in nonmedical healing should not preclude an individual from receiving the nonmedical "nursing" services, which are normally attendant to hospital services, when that individual has contributed to the Medicare and Medicaid medical insurance system.

Defendants' arguments and, indeed, this Court's opinion are premised on the notion that nonmedical nursing services, including such things as feeding, cleaning, clothing, and other aspects of physical maintenance, can be "unbundled" from medical nursing services. As such, a resident of a RNHCI would not be receiving 'special' benefits. Such an individual would receive basic care without any medical component, meaning that they would receive a *subset* of normal services rather than 'special' benefits *above and beyond* the norm.

Moreover, the legislative history reveals that Congress' purpose was to provide an accommodation that would allow people who had paid into the system to

The court stated, "That a law must have a secular purpose 'does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted.'" Id. (quoting Corporation of the Presiding Bishop, 483 U.S. at 335). As in the instant case, "Congress' purpose in enacting the RFRA was not to benefit a particular religious sect." Id. at 13. In the present case, Congress's action represents an effort to provide more egalitarian access to certain nonmedical benefits rather than to promote a particular religious sect.

Plaintiffs contend that the individual sections of the amendments, including the procedural and definitional sections, do not demonstrate a valid secular purpose. The Court disagrees; the amendments reflect a measured response by Congress to the tension between the Free Exercise Clause and the Establishment Clause. Without such an accommodation, the Medicare and Medicaid system could be susceptible to a Free exercise challenge by an individual who is forced to choose between receiving benefits due her and exercising her sincerely held religious beliefs. Recognizing this, Congress crafted a measured accommodation allowing an individual to choose to receive nonmedical nursing care as a result of genuinely held religious objections to traditional medicine. Indeed, Defendants note a number of competing interests balanced by Congress, including:

> "accommodating religious objectors to medical care who have paid into the programs but who would otherwise be excluded from receiving benefits during times of acute illness, preserving

> the essential character of the Medicare/Medicaid programs by ensuring that the limited benefits available for non-medical services do not swell to alter the nature and scope of benefits provided by the two programs for medical services, limiting any incentive to forego medical care in favor of an alternative, less-proven form of treatment, and preventing fraud and abuse."

Defs.' Mem. in Supp. of Mot. for S.J. at 26. Congress' efforts to carefully balance these concerns and achieve a fair and necessary accommodation reflect a valid, secular purpose. As such, the legislation satisfies the first prong of the *Lemon* test.

The second prong of the *Lemon* test requires that the law's "principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612-13. In *Corporation of the Presiding Bishop*, The Supreme Court recognized that it "has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause." 483 U.S. at 338 (internal citation omitted). The Court has also observed that "[n]eutrality in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." *Gillette*, 401 U.S. at 460 (exemption from military draft for religious conscientious objectors does not violate the Establishment Clause).

In *Sherbert v. Verner* and its progeny, the Supreme Court determined that the Free Exercise Clause required

accommodation in certain circumstances including the denial of unemployment benefits when an individual's religious beliefs precluded full participation in the unemployment compensation system. *See Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) (denial of benefits to Sabbatarian who refused to work on Saturday violated Free Exercise Clause); *see also, Hobbie*, 480 U.S. 136, 107 S.Ct. 1046 (1987) (denial of benefits to Seventh-day Adventist who refused to work certain hours because of his religion violated Free Exercise Clause); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 101 S.Ct. 1425 (1981) (denial of unemployment benefits to a Jehovah's Witness because his religious beliefs forbade his participation in the production of armaments violated the Free Exercise Clause). In *Sherbert*, the Court observed, "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshipers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert*, 374 U.S. at 409. Although they involve unemployment benefits, this line of cases sheds light on the court's treatment of religious accommodations in the context of widely available public benefits programs. *See also Bowen v. Kendrick*, 487 U.S. 589, 609, 108 S.Ct. 2562, 2574 (1988) ("[T]his Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs").

In this case, Plaintiffs contend that the Medicare and Medicaid amendments advance the cause of the Christian Science faith, because only Christian Science sanitoria will qualify as RNHCIs. Judge Kyle recognized, however, and this court agrees that it may not be assumed that "there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position." *CHILD I*, 938 F.Supp. at 1480. As discussed above, the nonmedical services of which a religious objector may avail herself within an RNHCI are a *subset* of services that would otherwise be available in a hospital setting. Such nonmedical services are only available to those whose illness is serious enough that they would be admitted to a hospital or nursing facility under normal circumstances. This can hardly be characterized as the promotion of a particular faith. Accordingly, the statute satisfies the second prong of *Lemon*.

The third and final prong of the *Lemon* test requires that a statute avoid excessive entanglement with religion. Plaintiffs also contend that the legislation involves an excessive entanglement between government and religion. In *Agostini v. Felton*, the Supreme Court determined that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here." *Agostini v. Felton*, 117 S.Ct. 1997, 2016 (1997). In another significant case, *Bowen v. Kendrick*, the Supreme Court addressed the issue whether the Adolescent Family Life act ("AFLA") violated the Establishment Clause,

because it provided grants to religious and other organizations providing counseling on teenage sexuality without expressly requiring that funds not be used for religious purposes. *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562 (1988).

In *Bowen*, the Court determined that the monetary grants awarded pursuant to the AFLA would not lead to excessive entanglement despite the monitoring that would be necessary to oversee the grant program. *Bowen*, 487 U.S. at 616. The Court noted that the government's involvement would likely include review of the grantees' programs, including educational materials, and visits by government employees to the clinics or institutions where AFLA programs are administered to determine if the funded programs are being conducted in accordance with statutory and constitutional requirements. *Id.* at 616-617. The holdings in *Agostini* and *Bowen* demonstrate that, to be violative of the Establishment Clause, government's involvement must be more extensive than mere oversight and the entanglement must be "excessive."

The requisite oversight of the Medicare and Medicaid exemptions in the instant case is similar to that in *Bowen*. The level of involvement with RNHCIs will not exceed the government's level of involvement in the review of AFLA programs. As the Court stated in *Bowen*, "this type of . . . monitoring does not amount to 'excessive entanglement. . . . ' " *Id.* at 617; *see also In re Young*, Slip Op. at 14 (RFRA does not foster an excessive government entanglement with religion). Accordingly, the Medicare and Medicaid amendments also satisfy the requirements of the "entanglement" prong of *Lemon*. Consequently, the Court finds that the amendments withstand Establishment

Clause challenge, and Defendants' and Defendant-Intervenor's motions for summary judgment will be granted.[3]

CONCLUSION

Based on the foregoing and all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant's and Defendant-Intervenor's motion for summary judgment is **GRANTED.**

2. Plaintiff's motion for summary judgment is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Ann D. Montgomery
Ann D. Montgomery
UNITED STATES
DISTRICT JUDGE

Dated: July 24, 1998

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[3] It should be noted that this Court's holding comports with the traditional presumption in favor of constitutionality of statutes enacted by Congress. *Agostini*, 487 U.S. at 617.

Children's Healthcare is a Legal Duty, Inc., a corporation under the laws of Iowa; Bruce Bostrom; and Steven Petersen, Plaintiffs, vs. Bruce C. Vladeck, in his capacity as director of Health Care Finance Administration, an agency of the United States; and Donna Shalala, in her official capacity as Secretary of the United States Department of Health and Human Services, an agency of the United States, Defendants, and The First Church of Christ, Scientist, Boston, Massachusetts, Defendant-Intervenor. Minnesota Civil Liberties Union, Amicus Curiae.

Civil No. 3-96-63

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

1996 U.S. Dist. LEXIS 12678

August 19, 1996, Decided

COUNSEL:

For CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED, a corporation under the laws of Iowa, BRUCE BOSTROM, STEVEN PETERSEN, plaintiffs: Robert James Bruno, Bruno Law Office, Burnsville, MN.

For BRUCE C VLADECK, in his official capacity as director of Health Care Finance Administration, an agency of the United States, DONNA SHALALA, in her official capacity as Secretary of the United States Department of Health and Human Services, an agency of the United States, defendants: Friedrich Anson Paul Siekert, US Atty Office, Minneapolis, MN. Sheila Lieber, Joseph W Lobue, US Dept of Justice, Torts Branch Civil Div Washington, DC. Lorie Mayorga. Joseph W LoBue, US Dept of Justice, Washington, DC.

For FIRST CHURCH OF CHRIST, SCIENTIST, intervenor-defendant: Ansis V Viksnins, Terrence Joseph Fleming, Lindquist & Vennum, Minneapolis, MN. Michael W McConnell, Stephen M Shapiro, Mayer Brown & Platt, Chicago, IL. Kenneth S Geller.

MINNESOTA CIVIL LIBERTIES, amicus: Gary D Ansel, Reinhardt & Anderson, St Paul, MN. Kathleen Milner.

JUDGES:

RICHARD H. KYLE, United States District Judge

OPINION BY:

RICHARD H. KYLE

OPINION:

ORDER

In a letter to the Court dated August 14, 1996 (Doc. No. 49), Defendant-Intervenor First Church of Christ, Scientist, has requested that the Court correct "three inadvertent factual errors" in its Memorandum Opinion and Order filed on August 7, 1996. Pursuant to Federal Rule of Civil Procedure 60(a), **IT IS ORDERED** that:

1) The word "practitioners" in the third line of the first full paragraph on page 27 be replaced with "nurses"; and

2) The word "practitioners" in the third line of the second full paragraph on page 28 be replaced with "nurses."[1]

August 19, 1996
RICHARD H. KYLE
United States District Judge

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[1] The third suggested change of "practitioners" to "nurses," in the first full sentence of page 3 of the Memorandum Opinion and Order, does not correct an "inadvertent factual error," and will not be incorporated. The first two changes, in contrast, address situations where the Court used the term "Christian Science practitioner" to refer to "those who practice Christian Science," not the specialized definition of "practitioner" employed by the Church. The Court sees no reason to refuse conformity with the Christian Science definition of "practitioner" in these two instances, and the substitution of the word "nurses" is appropriate. Both counsel for Plaintiffs and counsel for the government have indicated to the Court that they have no objections to the proposed changes.

Children's Healthcare is a Legal Duty, Inc., a corporation under the laws of Iowa; Bruce Bostrom; and Steven Petersen, Plaintiffs, vs. Bruce C. Vladeck, in his capacity as director of Health Care Finance Administration, an agency of the United States; and Donna Shalala, in her official capacity as Secretary of the United States Department of Health and Human Services, an agency of the United States, Defendants, and The First Church of Christ, Scientist, Boston, Massachusetts, Defendant-Intervenor. Minnesota Civil Liberties Union, Amicus Curiae.

Civil No. 3-96-63

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

938 F. Supp. 1466; 1996 U.S. Dist. LEXIS 12171; 51 Soc. Sec. Rep. Service 944

August 7, 1996, Decided

SUBSEQUENT HISTORY:
As Corrected August 14, 1996.

DISPOSITION:
Defendants' Motion for Summary Judgment (Doc. No. 25), is DENIED, that Defendant-Intervenor First Church of Christ, Scientist's Motion for Summary Judgment (Doc. No. 28) is DENIED, and that Plaintiffs' Motion for Summary Judgment (Doc. No. 3) is GRANTED.

COUNSEL:
Robert J. Bruno, Burnsville, Minnesota, for Plaintiffs.

Friedrich A.P. Siekert, Assistant United States Attorney, Minneapolis, Minnesota, Sheila M. Lieber and Joseph W. LoBue, Civil Division, Department of Justice, and Lorie Mayorga, Office of the General Counsel, Department of

Health and Human Services, of counsel, Washington, D.C., for Defendants.

Stephen M. Shapiro, Kenneth S. Geller, and Michael W. McConnell, Mayer, Brown & Platt, Chicago, Illinois, and Terrence J. Fleming and Ansis V. Viksnins, Lindquist & Vennum P.L.L.P., Minneapolis, Minnesota, for Defendant-Intervenor.

Gary D. Ansel, Reinhardt and Anderson, Saint Paul, Minnesota, for Minnesota Civil Liberties Union, amicus curiae.

JUDGES:
RICHARD H. KYLE, United States District Judge

OPINION BY:
RICHARD H. KYLE

OPINION:

MEMORANDUM OPINION AND ORDER

Introduction

Plaintiffs challenge the constitutionality of certain exemptions for Christian Science sanitoria under Medicare and Medicaid, claiming that Congress' creation of such exemptions violates the Establishment Clause of the First Amendment. Plaintiffs have filed a Motion for Summary Judgment, and both Defendants and Defendant-Intervenor The First Church of Christ, Scientist ("the Church") have submitted Cross-Motions for Summary Judgment. For the reasons set forth below, the Cross-Motions brought by Defendants and the Church will be

denied and Plaintiffs' Motion for Summary Judgment will be granted.

Background

The relevant facts are largely undisputed. The First Church of Christ, Scientist was founded by Mary Baker Eddy in 1879 and has grown to include nearly 3,000 congregations worldwide. Fleming Supp. Aff., Ex. T, at 278-79; Swan Aff. ¶ 3. A primary tenet of Christian Science is the belief that disease is caused by sin and mortal frailties; accordingly, physical healing is believed to be dependent on prayer instead of medical technology. Fleming Supp. Aff., Ex. T, at 279. A Christian Scientist is not rigidly compelled by the Church to employ purely spiritual means for healing; yet the concept of spiritual healing is central to the religion. *Id.* Christian Science practitioners of spiritual healing are certified by the Church and listed in the Christian Science Journal, a periodic publication of the Church. *Id.*; Swan Aff. ¶ 7. The Church has established a process for certifying sanitoria which practice Christian Science healing methods; although Christian Science does not teach that medical care will cure the body, it is undisputed that these institutions provide bed and board as well as general personal care. *See*, e.g., *HCFA Christian Science Supplement* §§ CS-200(D); 204(A).

Plaintiffs' Challenges to Medicare Act Exemptions

Part A of the Medicare Act, 42 U.S.C. §§ 1395 et seq., creates a comprehensive health insurance program for the aged and disabled. The Act pays for hospital care and for

post-hospitalization care provided by skilled nursing facilities, home health agencies, and hospices. 42 U.S.C. § 1395c. Payments under the Act are financed through a federal income tax on self-employment income (the Self-Employment Contributions Act) and federal employment taxes on wages paid to employees (mainly under the Federal Insurance Contributions Act, or "FICA"). Part B of the Medicare Act establishes a voluntary insurance program providing supplementary coverage for other medical expenses, such as physicians' fees and outpatient therapy. *See* 42 U.S.C. § 1395j, 42 U.S.C. § 1395k.

Plaintiffs challenge certain subsections and regulations of Part A of the Medicare Act which provide for the payment of nursing care and related services in Christian Science sanitoria. They note that most providers of health care under the Medicare Act are required to meet statutory and regulatory standards from which Christian Science sanitoria are exempted, and these exemptions form the basis of their claim under the Medicare Act.

First, Plaintiffs challenge the inclusion of Christian Science sanatoria in the Medicare Act definition of "hospital" in 42 U.S.C. § 1395x(e):

> The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions,

limitations, and requirements otherwise applicable) as may be provided in regulations.

Similarly, Plaintiffs challenge the inclusion of sanatoria in the definition of "skilled nursing facility" under 42 U.S.C. § 1395x(j)(12), which essentially mirrors the language quoted above. These provisions allow sanatoria to be eligible for benefits flowing from the Medicare and Medicaid programs.

Next, Plaintiffs challenge the exemption of Christian Science sanatoria from the requirements of 42 U.S.C. § 1320c. This section requires "quality control peer review organizations" to review the performance of physicians in the area. 42 U.S.C. § 1320c-3 requires practitioners to assure their patients that services will be provided in an economically efficient manner and only when medically necessary. 42 U.S.C. § 1320c-5 sets limits on the disclosure of patient information. 42 U.S.C. § 1320c-9. However, "[t]he provisions of this part shall not apply with respect to a Christian Science sanatorium operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts." 42 U.S.C. § 1320c-11. The accompanying regulations also exempt Christian Science sanatoria from the more detailed regulatory requirements of peer review organizations. 42 C.F.R. § 466.1.[1]

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[1] This regulation, which sets out definitions for use in later regulations concerning medical peer review, reads: "Hospital means a health care institution or distinct part of a health care institution . . . other than a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts." 42 C.F.R. § 466.1. In addition, the same regulation also excludes Christian Science sanatoria from the definition of a "skilled nursing facility." *Id.* Thus,

Absent the provisions allowing sanitoria to come within the definition of "hospital" and "skilled nursing facility," and absent the provisions exempting them from the extensive regulations found in 42 C.F.R. §§ 482 and 483, Church-certified institutions would have to meet a number of requirements relating to care by licensed physicians and nurses in order to qualify for federal aid under the Act.

Plaintiffs' Challenges to Medicaid Act Exemptions

Plaintiffs also challenge certain provisions of the Medicaid Act, found at 42 U.S.C. §§ 1396 et seq. The Act is designed to provide medical assistance to impoverished individuals who are aged, blind, or disabled, or are members of families with dependent children. 42 U.S.C. § 1396. The program is jointly financed by the federal and state governments, and is administered by the states. 42 U.S.C. § 1396a. 42 U.S.C. § 1396b(a). 42 U.S.C. § 1396d.

First, Plaintiffs attack the exclusion of Christian Science sanitoria from requirements imposed by state plans for medical assistance: "The provisions of paragraphs (9)(A),[2]

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sanitoria do not have to adhere to the regulations which address review responsibilities of utilization and "quality control" peer review organizations. Since sanitoria do not provide medical care, the lack of a necessity for peer review of medical matters is evident.

[2] This provision requires that a state plan for medical assistance must provide "that the State health agency, or other appropriate State medical agency . . . shall be responsible for establishing and maintaining health standards for private or

(31),[3] and (33)[4] and of section 1396b(i) (4)[5] of this title shall not apply to a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts." 42 U.S.C. § 1396a(a). Plaintiffs attack only 42 U.S.C. § 1396a(a), and not the above-referenced provisions.

Plaintiffs also challenge a variety of regulations promulgated under the Act which are generally designed to ensure that sanitoria qualify for payment under the Medicaid Act for appropriate services: 42 C.F.R. § 431.610(b),[6]

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public institutions in which recipients of medical assistance under the plan may receive care or services." 42 U.S.C. § 1396(a)(9)(A).

[3] This provision lays out reporting, inspection, and care requirements with respect to services in an intermediate care facility for the mentally retarded, where the state Medicaid plan includes medical assistance for such services. 42 U.S.C. § 1396a(31).

[4] This provision requires that the state health agency establish a plan for review of the quality and care of services furnished to Medicaid recipients by professional health personnel. 42 U.S.C. § 1396a(33).

[5] This subsection bars Medicaid payments from being made with respect to hospital services not made under a proper "utilization review plan." 42 U.S.C. § 1396b(i)(4). The structure of such a plan is described in 42 U.S.C. § 1395x(k), and is designed to provide for "in-house" review of admittance procedures and the services provided by the institution.

[6] The provision reads:

> A State plan must designate, as the State authority responsible for establishing and maintaining health standards for private or public institutions that provide services to Medicaid recipients, the same State agency that is used by the Secretary to

42 C.F.R. § 440.155(b)(1),[7] 42 C.F.R. § 440.170(b),[8] 42 C.F.R. § 440.170(c),[9] and 42 C.F.R. § 442.12(b).[10]

In addition, Plaintiffs attack regulations which exclude Christian Science sanitoria from definitions of "skilled nursing facilities" (42 C.F.R. § 456.251) and "intermediate care facilities" (42 C.F.R. § 456.351 and 42

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determine qualifications of institutions and suppliers of services to participate in Medicare (*see* 42 C.F.R. § 405.1902). The requirement for establishing and maintaining standards does not apply with respect to Christian Science sanitoria operated, or listed and certified, by the First Church of Christ Scientist, Boston, Mass.

[7] This provision includes in the definition of "nursing facility services" those services "[c]onsidered appropriate by the State and provided by a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ Scientist, Boston, Mass." Accordingly, certain services provided by a Christian Science sanitorium qualify for payment under the Medicaid Act.

[8] 42 C.F.R. § 440.170(b) defines "services of Christian Scientist nurses" to be services provided by nurses "who are listed and certified by the First Church of Christ, Scientist, Boston, Mass." if: 1) the services have been requested by the recipient; and 2) the services are provided under the supervision of a Christian Science visiting nurse organization, or as "private duty services" in a patient's home.

[9] This provision defines "services in Christian Science sanatoriums" to mean "services provided in Christian Science sanatoriums that are operated by, or listed and certified by, the First Church of Christ, Scientist, Boston, Mass." 42 C.F.R. § 440.170.

[10] This provision, following the language of the Medicaid Act, exempts Christian Science sanitoria from the certification provisions for intermediate care facilities designed to care for mentally retarded patients. *See* 42 U.S.C. § 1396a(a).

C.F.R. § 456.601). Such exclusions remove sanitoria from compliance with various certification requirements for medical care, with which other institutions must comply in order to receive payment under the Medicaid Act. Defendants note, however, and Plaintiffs do not dispute, that these particular regulations have been largely superseded by changes to the "utilization review plan" requirements in both the Medicare and Medicaid Acts. Mem. in Supp. of Defs.' Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. 9 n.9.

Finally, Plaintiffs challenge both a statutory provision, 42 U.S.C. § 1396g(e) (1), and a regulatory provision, 42 C.F.R. § 431.701, which exempt Christian Science sanitoria from the definition of "nursing home," allowing them to receive payments under Medicaid and Medicare without complying with state requirements for the licensing of nursing home administrators.[11]

In sum, Plaintiffs challenge the constitutionality of fifteen provisions of the Medicare and Medicaid Acts and the accompanying regulations.

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[11] While the Medicare Act makes specific allowances for Christian Science sanitoria, the Medicaid Act merely permits individual states to provide benefits to "any other type of remedial care recognized under state law, specified by the Secretary." 42 U.S.C. § 1396d(a)(25). The Secretary has specified, in two of the challenged regulatory provisions already discussed, that "remedial care" may include services provided by Christian Science sanitoria and nurses. 42 C.F.R. §§ 440.170(b), (c). The Secretary has also recognized, in another contested provision, that "nursing facility services" include services "considered appropriate by the State and provided by a Christian Science sanatorium." 42 C.F.R. § 440.155(b)(1).

Procedural History

Plaintiffs seek: 1) a declaratory judgment adjudging the above statutory and regulatory provisions to be null and void; 2) preliminary and permanent injunctions restraining Defendants from enforcing the exemptions and paying Medicare or Medicaid funds to Church-certified sanitoria; and 3) Plaintiffs' costs of suit and attorneys' fees. Compl. at 23-24. Plaintiffs' Motion for Summary Judgment, as well as the Complaint, contend that the challenged provisions violate the Establishment Clause of the First Amendment in four respects: 1) they give aid to pervasively sectarian institutions which exist solely to promote Christian Science spiritual treatment; 2) they represent a "sect-specific direct subsidy" of Christian Science religious rituals; 3) they delegate to the Church the power to operate, list and certify institutions which will qualify for favorable treatment under the Acts; and 4) they constitute a governmental preference, both real and symbolic, for the practice of Christian Science spiritual treatment.

The Church was allowed to intervene as a Defendant.

Defendants and the Church have also filed Motions for Summary Judgment. The Minnesota Civil Liberties Union as amicus curiae was allowed to file two briefs in support of Plaintiffs' Motion for Summary Judgment. The hearing on the three outstanding Motions was held before the undersigned on June 4, 1996.

Discussion

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56 states:

> [summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the party not moving for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

The party moving for summary judgment bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The evidence of the nonmoving party is to be believed and all justifiable inferences are to be drawn in a light most favorable to that party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1357, 89 L. Ed. 2d 538 (1986); *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513; *see* also *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995). Where a moving party makes and supports a motion for summary judgment in accordance with Rule 56, a party opposing the motion may not rest upon the allegations or denials of its pleadings; rather, the adverse party's

response must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256, 106 S. Ct. at 2514. *See* also Fed. R. Civ. P. 56(e). The parties agree that no genuine issues for trial exist.

II. Establishment Clause Review – The Proper Standard

When an act of government is challenged under the Establishment Clause,[12] the familiar three-pronged test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), is often applied. To survive an Establishment Clause challenge under the *Lemon* test, a law must: "(1) reflect a clear secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee v. Weisman*, 505 U.S. 577, 585, 112 S. Ct. 2649, 2654, 120 L. Ed. 2d 467 (1992) (applying *Lemon*).

Yet the use of the *Lemon* test in Establishment Clause cases was limited by *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982). Larson inaugurated a harsher test of strict scrutiny when "the law facially differentiates among religions." 456 U.S. at 246, 102 S. Ct. at 1684. Such a law must be "closely fitted to the furtherance" of a "compelling government interest" in order to pass constitutional muster. 456 U.S. at 255, 102 S. Ct. at 1689. The more difficult standard is merited because "the clearest command of the Establishment Clause is that one

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[12] "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I.

religious denomination cannot be officially preferred over another." 456 U.S. at 244, 102 S. Ct. at 1683.

In *Larson*, the Court struck down a Minnesota law which provided that only those religious organizations receiving more than half of their total contributions from members or affiliated organizations were exempt from registration and reporting requirements found in the Minnesota Charitable Solicitation Act. The Act provided for a system of registration and disclosure for charitable organizations; prior to 1978, all religious organizations had been exempted from the Act's requirements. The Court applied strict scrutiny to the law because it demonstrated a denominational preference: older, more established churches were given an advantage over newer religions which depended more heavily on contributions from the general public. 456 U.S. at 246, 102 S. Ct. at 1684. The Court subsequently found that the law evinced the explicit intention of including particular religious denominations and excluding others, and was not closely fitted to the furtherance of any compelling governmental interest. 456 U.S. at 255, 102 S. Ct. at 1689.

Post-*Larson* jurisprudence indicates that dissension exists over whether *Larson* should be applied in conjunction with or completely apart from *Lemon*; notably, the *Lemon* test has also suffered criticism, but has never been overruled. The majority in *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S. Ct. 1355, 1362, 79 L. Ed. 2d 604 (1984),[13]

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[13] *Lynch* involved a Christmas display, which included a creche, owned by the city of Pawtucket, Rhode Island. The display as a whole was held not to violate the Establishment Clause.

observed that the *Larson* Court eschewed the *Lemon* test in a situation "where there was substantial evidence of overt discrimination against a particular church." In a concurring opinion, Justice O'Connor suggested that the *Larson* standard may be "assimilated" to the *Lemon* test. 465 U.S. at 689 n.*, 104 S. Ct. at 1367 n.* (O'Connor, J., concurring). She proposed that "plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored." *Id. See Board of Educ. of Kiryas Joel v. Grumet*, 509 U.S. 938, ___, 114 S. Ct. 10, 125 L. Ed. 2d 762 (1994) (Blackmun, J., concurring) ("I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)."); *see also School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 383, 105 S. Ct. 3216, 3222, 87 L. Ed. 2d 267 (1985) ("We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria.").[14] Moreover, in *Kiryas Joel*, in which the Court invalidated the formation of a school district whose boundaries were coterminous with that of a religious community, *Larson* was cited but strict scrutiny was not explicitly applied.

Here, the contested provisions explicitly address institutions of a single religion. Defendants and the

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[14] The Grand Rapids case did not mention the *Larson* test, but neither did it involve aid to a particular denomination.

Church attempt to avoid the higher standard of *Larson* altogether by noting that *Larson* did not involve an effort to accommodate religious beliefs, but rather to disadvantage a particular group. Defs.' Reply in Supp. of Defs.' Mot. for Summ. J. 12; Reply Brief in Supp. of Mot. of Def.-Intervenor First Church of Christ, Scientist, for Summ. J., and in Opp'n to Pl.'s Mot. for Summ. J. 8. Nowhere in Larson or the subsequent cases are these distinguishing factors; instead, the sole distinguishing factor *Larson* espouses is a differentiation between religious groups on the face of a statute. Nor does case law distinguish between the application of *Larson* (a challenge under the Free Exercise Clause) to Establishment Clause challenges as opposed to cases under the Free Exercise Clause. This Court reads the decision in *Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S. Ct. 2136, 2146, 104 L. Ed. 2d 766 (1989),[15] to mandate that the proper and initial inquiry is whether the law facially differentiates among religions, whether

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[15] The Court in *Hernandez* recognized the establishment of a two-level inquiry:

> *Larson* teaches that, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman* [citation omitted].

490 U.S. at 695, 109 S. Ct. at 2146. *See* also, e.g., *Wilson v. NLRB*, 920 F.2d 1282, 1287 (6th Cir. 1990), cert. denied, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 896 (1992) ("When a law facially differentiates among religions, it is subject to strict scrutiny and it 'must be invalidated unless it is justified by a compelling governmental interest.' " (quoting *Larson*, 456 U.S. at 247, 102 S. Ct. at 1685)).

the case is brought under the Establishment Clause or the Free Exercise Clause. If the law does facially differentiate, strict scrutiny applies; if it does not, courts should proceed to apply the *Lemon* test.[16] As noted by the District of Columbia Circuit, this situation is especially appropriate for review under *Larson*: "A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a 'denominational preference' not easily reconciled with the establishment clause." *Olsen v. DEA*, 279 U.S. App. D.C. 1, 878 F.2d 1458, 1461 (D.C. Cir. 1989), cert. denied, 495 U.S. 906, 110 S. Ct. 1926, 109 L. Ed. 2d 290 (1990) (R.B. Ginsburg, J.) (citing *Larson*, 456 U.S. at 245, 102 S. Ct. at 1683-84).[17]

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[16] Both Defendants and the Church cite *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), as supporting the idea that *Larson* does not necessarily apply when the federal government singles out a religious sect for special treatment. The court in *Peyote Way* was faced with a challenge to federal and Texas laws prohibiting peyote possession by all except members of the Native American Church of North America. The Fifth Circuit, it is true, did not apply *Larson*, but, upon a careful reading of the case, the reason it did not do so becomes clear: "The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment." *Id.* at 1217. *Peyote Way* thus does not aid this Court's analysis.

[17] Justice O'Connor has posited that the *Larson* standard, which she recognizes as applying to statutes which plainly embody an intentional discrimination among religions, may also be conformed to the Supreme Court's standard for finding "endorsement" of a religion. "Plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of

Since such differentiation is present here in the context of a statutory exemption, the strict scrutiny test of *Larson* must be applied. The inquiry becomes whether the Medicare and Medicaid exemptions for Christian Scientists are "closely fitted" to the furtherance of a "compelling" governmental interest.

III. The Government's Interest

A. Background of the Medicare and Medicaid Acts

A logical place to commence the inquiry of whether the government's interest in the challenged provisions may be termed "compelling" is to look at the purpose of the Acts and the provisions themselves. Both Acts guarantee their beneficiaries (which, together, include or will eventually include most of this country's population) the freedom to select a health care provider. The Medicare Act states: "Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services." 42 U.S.C. § 1395a. The Medicaid Act likewise provides: " . . . any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community, pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services. . . . " 42 U.S.C.

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the favored religion or a disapproval of the disfavored." *Lynch v. Donnelly*, 465 U.S. 668, 688, 79 L. Ed. 2d 604, 104 S. Ct. 1355, 1367 n.* (1984) (O'Connor, J., concurring).

§ 1396a. The Acts also forbid governmental attempts to compel a certain type or manner of health care services. *See* 42 U.S.C. § 1395a;[18] 42 U.S.C. § 1396f.[19]

More specifically, the legislative history demonstrates that the challenged provisions of the Acts were the product of careful congressional deliberations. To its credit, Congress recognized the inherent tension between the Establishment Clause and the Free Exercise Clause. If Congress decided to include no religious exemptions to the Acts, they would likely face a free exercise challenge, as they would force members of religious groups to contribute to a health benefit fund from which they would be barred from participation because of their religious

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[18] This section of the Medicare Act makes clear that it does not "authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided . . . or to exercise any supervision or control over the administration or operation of any such institution, agency or person."

[19] This section of the Medicaid Act also indicates that Congress considered the impact of such a broad health care program on the religious rights of its beneficiaries:

> Nothing in this subchapter shall be construed to require any State which has a plan approved under this subchapter to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parent or guardian objects) thereto on religious grounds.

beliefs.[70] As this suit shows, it is often extremely difficult for Congress to navigate between the Scylla and Charybdis of these two Clauses.[71]

During the hearings leading up to the passage of the Acts, representatives of Christian Science asked that Congress provide an exemption from the portion of social security and railroad retirement taxes which would pay for medical health insurance, since their religion did not employ medical treatment and care. Hearings on H.R. 4222 Before the House Ways & Means Comm., 87th Cong., 1st Sess. 728-29 (1961) (testimony of Dr. J. Borroughs Stokes). Congress instead opted to accommodate Christian Science in another way, by, first, including Christian Science sanitoria and nurses under the programs, and, second, excusing them from certain requirements tied to medical treatment not undertaken by Christian Science nurses or in Christian Science sanitoria.

Aside from the Acts themselves, two segments of legislative history illustrate the congressional intent behind this dual accommodation. First, the Senate Report accompanying the Social Security Amendments of 1965 (providing for the Medicare Act) stated:

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[70] This is not to say, however, that such a free exercise challenge would succeed. *See infra* Section III.B.3.

[71] In Homer's Odyssey, Odysseus was forced to guide his ship between the twin perils of Scylla, a six-headed monster who would devour six of his crewmen, and Charybdis, a violent whirlpool which threatened to drag his ship into certain oblivion. *See Homer*, The Odyssey 191-96 (E.V. Rieu trans., Penguin Books 1960).

> Christian Science sanatoriums that are operated or listed and certified by the First Church of Christ, Scientist, in Boston, could participate in the program as "hospitals." The participation of these institutions and the payment for items and services furnished by them would be subject to such conditions, limitations, and requirements as may be provided in regulations. In general, however, the committee intends that payments to Christian Science sanatoriums would cover costs of services ordinarily furnished by these sanatoriums to patients which are comparable to those for which payment could be made to hospitals and intends these sanatorium services to be a substitute for, and not an addition to, medical services that might be furnished to a person if his religious beliefs were not contrary to the use of the usual facilities.

S.Rep. No. 404, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 1971.

Seven years later, in considering the Social Security Amendments of 1972, the House Report laid out the rationale for exempting sanitoria from generally applicable medical care requirements:

> Your committee believes that Christian Science sanatoriums, which do not actually provide medical care, should not be required to have a skilled nursing home administrator licensed by the State, to maintain an organized nursing service under the direction of a registered nurse, to maintain detailed medical records, or to have diagnostic and other service arrangements with general hospitals. The bill would therefore exempt Christian Science sanatoriums from the requirements for a licensed nursing home

> administrator and other inappropriate medical requirements of the medicaid program. Such sanitoriums would be expected to continue to meet all applicable safety standards.

H.R.Rep. No. 231, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4989, 5106.

B. Compelling Interests

Plaintiffs first argue under the auspices of the "purpose" prong of *Lemon*, that Congress has no "legitimate, valid secular purpose in lowering or eliminating standards for some of the elderly or needy based upon a standardless certification" by the Church. Pl.'s Mem. in Supp. of Mot. for Summ. J. 11-12. Then arguing under *Larson*, Plaintiffs contend that the government "has no compelling interest in reimbursing non-medical methods of care that are not state-licensed and have no scientific data indicating their therapeutic or prophylactic effectiveness." Pl.'s Combined Reply Mem. in Supp. of Their Mot. for Summ. J. and Responsive Mem. to Defs.' Mots. for Summ. J. 9. Of course, these assertions do not address the obvious concern of Congress in passing these exemptions: forcing Christian Scientists to choose between: 1) following their religion and enduring financial hardship; or 2) violating an apparently deeply held belief and receiving Medicare and Medicaid benefits. Congress instead made an accommodation to avoid such a choice, allowing Christian Scientists to participate in these otherwise available public programs, to which they have almost certainly contributed part of their wages.

The Court will now address whether this interest may properly be labelled "compelling."

1. Accommodations Sometimes Constitutionally Required

Accommodations of religion have been held to be required by the Free Exercise Clause in certain situations. In *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), the Court held that a state's denial of unemployment benefits to a Jehovah's Witness because his religious beliefs forbade his participation in the production of armaments violated the Free Exercise Clause. In making clear that the state was compelled to consider religious beliefs in the application of its unemployment compensation law, the Court stated: "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 U.S. at 716, 101 S. Ct. at 1431 (citing *Everson v. Board of Educ.*, 330 U.S. 1, 16, 67 S. Ct. 504, 511, 91 L. Ed. 711 (1947)). The Court went on to say:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18, 101 S. Ct. at 1432.

Similarly, the Court has held that a refusal to award unemployment compensation benefits when an applicant declines to work certain hours for valid religious reasons violates the Free Exercise Clause. *See Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987) (denial of benefits to Seventh-Day Adventist who refused to work certain hours violated Free Exercise Clause); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (denial of benefits to Sabbatarian who refused to work on Saturdays violated Free Exercise Clause).[22] In *Hobbie*, citing the language from *Thomas* quoted above, the Court reaffirmed its earlier holdings that "such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest." 480 U.S. at 141, 107 S. Ct. at 1049.

2. Accommodation Statutorily Required

At oral argument, counsel for Plaintiffs claimed that *Thomas*, *Hobbie*, and *Sherbert* had no application outside the unemployment compensation arena. The Supreme Court has indeed expressed such doubt. In *Employment Division, Department of Human Resources of Oregon v.*

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[22] The *Sherbert* Court quoted *Everson v. Board of Education*, 330 U.S. 1, 16, 67 S. Ct. 504, 512, 91 L. Ed. 711 (1947) for the proposition that no state may exclude "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." 374 U.S. at 410, 83 S. Ct. at 1797 (emphasis in original).

Smith, 494 U.S. 872, 883, 110 S. Ct. 1595, 1602, 108 L. Ed. 2d 876 (1990), the Court noted that it had never invalidated any governmental action on the basis of the *Sherbert* "compelling interest" test except the denial of unemployment compensation, and observed that the *Sherbert* test may have fallen into disuse. *Id.* The holding in *Smith*, however, is only that the *Sherbert* test should not be applied to require exemptions from a generally applicable criminal law. 494 U.S. at 884, 110 S. Ct. at 1603.

In 1993, Congress expressly disapproved of the holding of *Smith* in the passage of the Religious Freedom Restoration Act ("RFRA"). In the Act, Congress found that:

> (4) in *Employment Division v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a).

Congress defined its purposes in passing the Act:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972) and to guarantee its application in

> all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to a person whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

In furtherance of this purpose, the RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except if it demonstrates that the restriction is in furtherance of a compelling governmental interest, and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000bb-1. Congress also expressed its intent not to interfere with Establishment Clause jurisprudence:

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter.

42 U.S.C. § 2000bb-4.[23]

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[23] The efficacy of this provision is somewhat doubtful, since there is a fair deal of interplay between the Free Exercise Clause and the Establishment Clause. For example, under the *Larson* test, the government must show a compelling interest for facially differentiating between sects; yet if it did not distinguish between sects here, and the Christian Scientists

Thus, while the RFRA by its very language has no direct impact on this Establishment Clause case, it demonstrates the importance Congress attaches to the free exercise of religion by extending the *Sherbert* line of cases to all burdens on free exercise. It must be pointed out, however, that this extension of *Sherbert* has not been held to be constitutionally mandated, but represents a "legislatively mandated accommodation of the exercise of religion." *EEOC v. Catholic University of America*, 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C. Cir. 1996) (quoting *Flores v. City of Boerne, Texas*, 73 F.3d 1352, 1364 (5th Cir. 1996)).[24]

In any case, it is difficult to square the dicta in *Smith* with recent Supreme Court precedent which recognizes "the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Kiryas Joel*, ___ U.S. at ___, 114 S. Ct. at 2492 (quoting *Hobbie* for the proposition that "government may (and sometimes must) accommodate religious practices

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claimed (as they reasonably could) that the Medicare and Medicaid Acts substantially burdened the exercise of their religion, Congress would have to demonstrate a compelling interest for not exempting them from certain requirements of the programs. This awkward situation leads to strict scrutiny of Congress' action, no matter which path it chooses to take.

[24] At least one Eighth Circuit judge has stated his belief that the RFRA is unconstitutional. *Hamilton v. Schriro*, 74 F.3d 1545, 1563-70 (McMillian, J., dissenting). In any case, it should be noted that the RFRA explicitly does not apply to the Medicare and Medicaid Acts, as it only subjects "[f]ederal statutory law adopted after November 16, 1993" to its provisions.

and . . . may do so without violating the Establishment Clause").

It is even more difficult to harmonize the dicta in *Smith* with precedent from this Circuit. In *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), aff'd by an equally divided Court, 472 U.S. 478, 105 S. Ct. 3492, 86 L. Ed. 2d 383 (1985) (per curiam), the court determined that Nebraska's requirement that applicants for a driver's license submit to having color photographs taken and affixed to the license unconstitutionally burdened the plaintiff's free exercise of her religious beliefs. Allowing her to receive her license without a photograph was found to be a reasonable accommodation of her religion.

Finally, unemployment compensation laws and the Acts in question are very similar in nature, even considering that decisions to award or deny unemployment compensation are often context-specific – they are public benefits programs widely available to the public.

Congress has indicated that it favors the accommodation of the exercise of religion as a very important interest. This interest is magnified when the accommodation is made to ensure participation in a comprehensive welfare system. *See In re Young*, 82 F.3d 1407, 1419 (8th Cir. 1996) (citing *Droz v. Commissioner of I.R.S.*, 48 F.3d 1120, 1122-23 (9th Cir. 1995), cert. denied, ___ U.S. ___, 133 L. Ed. 2d 656, 116 S. Ct. 698 (1996)).

3. Accommodation Required by the Free Exercise Clause is Not Co-Extensive with Permissible Actions Under Establishment Clause

This is not to say, however, that the present accommodation is mandated by the Free Exercise Clause. The exemptions here would not be considered constitutionally compelled by the Free Exercise Clause, since, absent the Christian Science exemptions, the Medicare and Medicaid Acts are laws "entirely neutral in [their] general application" and concern taxes imposed nationwide. *United States v. Lee*, 455 U.S. 252, 263, 102 S. Ct. 1051, 1058, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring). But the fact that the exemptions are not constitutionally compelled does not mean that they do not represent a permissible accommodation. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 673, 90 S. Ct. 1409, 1413-14, 25 L. Ed. 2d 697 (1970); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8, 109 S. Ct. 890, 901-02 n.8, 103 L. Ed. 2d 1 (1989) ("[W]e in no way suggest that all benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334, 107 S. Ct. 2862, 2867, 97 L. Ed. 2d 273 (1987) (quoting Walz's statement that limits on accommodation are not co-extensive with noninterference mandated by Free Exercise Clause); *Zorach v. Clauson*, 343 U.S.

306, 72 S. Ct. 679, 96 L. Ed. 954 (1952) (upholding New York City's accommodation of students' religious preferences by giving them option of staying in public school or leaving to attend religious classes for part of day, even though accommodation evidently was not mandated by Free Exercise Clause).[25]

Based on this principle, this Court determines that the interest in accommodating religious beliefs in the context of generally available public welfare programs, in order to ensure that all those who pay taxes to support the programs may benefit from them, is a sufficiently compelling interest to survive the first prong of strict scrutiny review. The Court must now determine whether the exemptions are "closely fitted" to the furtherance of that interest, in light of the principle of neutrality among religions.

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[25] Yet in these cases, the relevant law did not discriminate between sects, illustrating a second relevant point: " 'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties [citing *Walz*], so long as an exemption is tailored broadly enough that it reflects valid secular purposes." *Gillette v. United States*, 401 U.S. 437, 454, 91 S. Ct. 828, 838, 28 L. Ed. 2d 168 (1971), quoted with approval in *Bullock*, 489 U.S. at 13 n.3, 109 S. Ct. at 899 n.3. *See also Committee for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793-94, 93 S. Ct. 2955, 2975-76, 37 L. Ed. 2d 948 (1973) (noting that breadth of exemption for religious groups is [sic] "important factor" in assessing constitutionality). The different tests in *Lemon* and *Larson* confirm that laws which treat religion broadly receive less scrutiny than laws which contemplate only one religious sect. This problem is addressed in the next Section.

IV. Close Fit Is Absent

Notably, the Minnesota statute at issue in *Larson*, distinguishing between religions on the basis of their revenue sources, was not struck down because of the lack of a compelling interest. The Court assumed, arguendo, that the state's interest in "protecting its citizens from abusive practices in the solicitation of funds for charity" was sufficiently "compelling." In doing so, the Court relied on the fact that the statute, "viewed as a whole, has a valid secular purpose." 456 U.S. at 248, 102 S. Ct. at 1685. The Court has already determined that the interests served here are compelling, supported by the nature of Medicare and Medicaid as generally available public welfare programs. This determination accords with exhortations by the Church and Defendants to view the Acts in their entirety, instead of focusing solely on the Christian Science exemptions.

Yet, when it comes to determining a close fit, this Court cannot view the Medicare and Medicaid Acts holistically. In the context of the overall Medicare and Medicaid programs, the accommodation's impact is of course very small – more than 99.9% of all institutions receiving funds are not Church-certified. Ault Decl. ¶¶ 3-4. Yet no other group, religious or non-religious, is entitled to the exemptions declared by the statute on its face. The *Larson* Court plainly stated that "our inquiry must focus more narrowly, upon the distinctions drawn by § 309.515, subd. 1(b) itself: Appellants must demonstrate that the challenged fifty per cent rule is closely fitted to further the interest that it assertedly serves." *Id.*

A. The Exemptions Are Too Narrowly Confined

This Court is faced with two programs which, while providing generally available public benefits, authorize exemptions to the programs in expressly sectarian terms. The exemptions here address only Christian Science nurses and sanitoria. This is the narrowest of categories. Standing alone, the specificity of the exemption is very significant. Of course, the compelling interest is the accommodation of the free exercise of religion in the Medicare and Medicaid programs, not the accommodation of the Christian Science method of healing in particular. If the exemptions are meant to accommodate the free exercise of religion, it is troubling that the exemptions adopt the standards and certification procedures of only one. Like *Larson*, this Court concludes that the sect-specific exemptions are not closely fitted to the identified governmental interest.

While the *Walz* Court noted that Congress could pass laws which complied with the Establishment Clause, yet were not compelled by the Free Exercise Clause, the Court's opinion in *Kiryas Joel* puts that holding in perspective:

> In *Walz* . . . , for example, the Court sustained a property tax exemption for religious properties in part because the State had "not singled out one particular church or religious group or even churches as such," but had exempted "a broad class of property owned by nonprofit, quasi-public corporations." . . . And *Bowen* . . . upheld a statute enlisting a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular

> institution." . . . Here, the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole. . . .

___ U.S. at ___, 114 S. Ct. at 2491-92 (citations and footnote omitted).

The exemptions here are not nearly as broad as those in *Bowen* or *Walz*. While it is true that the benefits under Medicaid and Medicare are generally available, and do not require a resort to Christian Science, the benefits provided under the statutes are not uniform – institutions which would not otherwise qualify for the receipt of funds are able to receive such funds by virtue of their status as Christian Science sanitoria. Accordingly, in determining whether the exemption is a permissible accommodation or an impermissible establishment, its sect-specific nature tips the scales toward a finding of establishment under Supreme Court jurisprudence.

In so finding, the Court does not ignore the laudable purpose behind the exemptions. The care given in Christian Science sanitoria and performed by Christian Science nurses certainly does "cohere" with the Church's religious mission. *See Cohen v. City of Des Plaines*, 8 F.3d 484, 492 (7th Cir. 1992), cert. denied, ___ U.S. ___, 129 L. Ed. 2d 861, 114 S. Ct. 2741 (1994). As such, the Medicare and Medicaid exemptions do operate to remove a burden to the free exercise of the Christian Science religion, without necessarily increasing the tax bills of non-Christian Scientists; the exemptions, however, are not compelled by the Free Exercise Clause. *Cf. Cohen*, 8 F.3d at 492-93 (distinguishing case from Bullock because, in present case, free

exercise concerns existed and law did not burden non-beneficiaries).

The Court also notes that the importance of accommodation was recognized in *Larson*, the case which imposed strict scrutiny on sect-specific classifications: "This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." 456 U.S. at 245, 102 S. Ct. at 1683. The *Larson* Court further noted that, when balancing the Establishment and Free Exercise Clauses, "'the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.'" 456 U.S. at 246, 102 S. Ct. at 1684 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305, 83 S. Ct. 1560, 1615, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring)).

Yet even the most honorable of intentions cannot cure the constitutional defect. The general interest of religious accommodation is consistent with the values supporting the First Amendment; this particular manner of accommodation is not.

Counsel for Defendants noted at oral argument that the reason Christian Science sanitoria were singled out by name in the exemptions was that, at the time the Medicare and Medicaid Acts were being contemplated and refined by Congress, it was the only religious group which came forward with a network of health care facilities standing as an alternative to traditional medical care. This, it is argued, makes Christian Science unique and allows the sect-specific language in the Acts. This logic

clashes with the rationale of *Kiryas Joel*. "The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way." ___ U.S. at ___, 114 S. Ct. at 2491. Just as the community of Kiryas Joel did not receive its accommodation "simply as one of many communities eligible for equal treatment under a general law," the Christian Scientists did not receive their accommodation in such a manner. *Id.* As in *Kiryas Joel*, there is no guarantee that a religious group in a similar situation to the Christian Scientists (i.e., a religious group believing in faith healing which has set up certain institutions to promote such healing) would receive a similar accommodation from Congress. *Id.* This Court may not assume that there is not nor will there ever be a group in a situation similar to that of the Christian Scientists' current position in order to justify the restriction. While it is a compelling interest to ensure that all eligible citizens receive appropriate coverage under Medicare and Medicaid, it is not a close fit to utilize the standards of only one sect in attempting to further that interest.

The Court has not ignored the Church's and Defendants' citation to *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982). In *Lee*, a member of the Amish religion claimed that the imposition of social security taxes on his employees violated the Free Exercise Clause, as both he and his employees were opposed to the national social security system. The Social Security Act, like the Medicare and Medicaid Acts, is a publicly available welfare program funded primarily by employment taxes. Congress, however, created the possibility for religious self-employed individuals to exempt themselves

from the Act, in accordance with 26 U.S.C. § 1402(g), which reads:

> Any individual may file an application . . . for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). In order to qualify for the exemption, the applicant must waive his right to all social security benefits and the Secretary of Health and Human Services must find that the particular religious group makes sufficient provision for its dependent members.

Unlike the exemptions at issue here, this provision does not explicitly refer to the protection of the Old Order Amish. Yet the restrictions placed on the exercise of this exemption made clear that this exemption was intended for a very small number of existing religious groups. The exemption only becomes active if the Commissioner of Social Security finds that it has been the practice of the religious group to provide for its dependent members for a substantial period of time, 26 U.S.C. § 1402(g)(1)(D), and if the group has been in existence at all times since December 31, 1950, 26 U.S.C. § 1402(g)(1)(E). The legislative history mentions, as an example, the practices and beliefs of the Old Order

Amish. H.R. Rep. No. 89-213, 89th Cong., 1st Sess. 102 (1965), U.S.Code Cong. & Admin.News 1965, 305, 311.[26]

In *Lee*, the Supreme Court noted that the exemption covered only self-employed individuals and not employers or employees. The Court went on to find that the government's interest in assuring mandatory participation in a comprehensive national social security system was very high, and that the Amish religious belief afforded no basis for resisting the Social Security tax. The Court stated: "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." 455 U.S. at 261, 102 S. Ct. at 1057.

The Supreme Court explicitly declined, however, to determine whether the exemption would have conflicted with the Establishment Clause if it had included within its ambit religious employers and employees, 455 U.S. at 261 n.11, 102 S. Ct. at 1057 n.11. It also did not address the restriction that the religious group providing the alternative welfare system be formed before 1951. While other courts have found Section 1402(g), or more often portions of it, constitutional, the exemptions at issue here are

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[26] Under the Medicare and Medicaid Acts, the nature of the exemptions is a bit different. Instead of allowing wholesale exclusion from the programs, Christian Science adherents must pay their full measure of Medicare and Medicaid taxes. However, they are then allowed to visit Christian Science sanitoria, where the programs will pay for certain services. Section 1402(g) provides that a qualified person may pay no Social Security taxes but, as a consequence, must give up all claims to Social Security benefits.

narrower. This Court cannot avoid the use of strict scrutiny here, as other courts have done with Section 1402(g), and cannot avoid the lack of neutrality present in the exemptions.[27]

The Third Circuit in *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3d Cir. 1987), cert. denied, 485 U.S. 959, 108 S. Ct. 1221, 99 L. Ed. 2d 422 (1988), found the entirety of Section 1402(g) constitutional. The court found that Section 1402(g), as well as Section 1402(e) (which exempts ministers, members of religious orders, and Christian Science practitioners from social security taxation), were both based on secular considerations and were rational accommodations. The secular concerns behind the exemptions were held to be the integrity of

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[27] Circuit courts of appeals have examined Section 1402(g) in connection with the Establishment Clause; however, none has applied strict scrutiny. In *Jaggard v. Commissioner of Internal Revenue*, 582 F.2d 1189 (8th Cir. 1979), cert. denied, 440 U.S. 913, 99 S. Ct. 1228 (1979) and *Droz v. Commissioner of I.R.S.*, 48 F.3d 1120, 1124-25 (9th Cir. 1995), cert. denied, ___ U.S. ___, 133 L. Ed. 2d 656, 116 S. Ct. 698 (1996), Section 1402(g)'s requirement that the individual belong to a religious group was upheld against an Establishment Clause challenge. However, the courts did not address any other requirements for the exemption. The *Droz* court explicitly declined to apply *Larson* since, looking at only the group requirement of the exemption, it did not discriminate among religions or promote some religions over others. *Id.* at 1124, 1125 n.6. The court noted, however, that preserving the integrity of the Social Security system and ensuring that all persons were covered by a welfare plan were compelling interests, and that limiting the exemption to religious groups with their own welfare system was narrowly tailored to meet that interest.

the social security system, which were perhaps "compelling," and Congress' "overly cautious" conclusion that not passing the Section 1402(e) exemption would raise free exercise problems. *Id.* at 1341-42 & n.10. The court found that the "rationality" standard, instead of the "compelling interest" standard, should be applied, because the distinction was based on secular concerns. *Id.* at 1341-42 (citing *Gillette v. United States*, 401 U.S. 437, 452, 91 S. Ct. 828, 837, 28 L. Ed. 2d 168 (1971)).

The *Gillette* Court noted, however, that the provision at issue in that case required "no particular sectarian affiliation or theological position," giving it no occasion to determine the outcome when "Congress grants a benefit expressly to adherents of one religion." 401 U.S. at 450-51, 91 S. Ct. at 836-37 (emphasis in original). Since this case does involve a benefit to adherents of one religion, and *Larson* requires strict scrutiny in such a case, Bethel Baptist Church is of limited aid. This Court does not have the luxury of finding a lack of discrimination between sects, as it is apparent on the face of the Acts. In that respect, this Court faces a different question, and cannot rely on these interpretations of Section 1402(g).

B. Plaintiffs Have Standing to Raise Such a Claim

The Church claims that Plaintiffs lack standing to bring, and this Court lacks the authority to determine, the merits of the argument that other similarly situated groups have been or will be denied equal treatment, because Plaintiffs are admittedly not members of similarly situated groups. More specifically, the Church contends that Plaintiffs' speculation that other religions may

not be accommodated as the Christian Scientists have been is inadequate to grant taxpayer standing. Mem. in Supp. of Def.-Intervenor 28 n.9 (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). The Church argues that since Plaintiffs are not part of a similar situated group which is unequally treated by the exemptions, this hypothetical situation may not be addressed.[28]

The Church does not consider the narrow exception for taxpayer standing concerning challenges of certain government expenditures under the Establishment Clause. In *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), the Court held that federal taxpayers have standing to raise Establishment Clause claims against certain exercises of congressional power. The *Flast* Court found standing in cases where the taxpayer could prove two things: 1) the allegedly unconstitutional action has been taken under the Taxing and Spending Clause; and 2) the challenged action has exceeded a specific constitutional limitation upon the taxing and spending power. Although the *Flast* exception to the rule against taxpayer standing has been greatly limited, it still has force in challenges brought under the Establishment Clause.[29] In *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct.

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[28] The Court is cognizant of the judicial duty to avoid declaring a statute unconstitutional if at all possible. *See, e.g., Rescue Army v. Municipal Court*, 331 U.S. 549, 568-74, 67 S. Ct. 1409, 1419-22, 91 L. Ed. 1666 (1947). Yet the Court cannot decline to decide issues properly before it: Plaintiffs have referenced this argument in their papers and at oral argument.

[29] The case of *Allen v. Wright*, cited by the Church in support of its argument, did not involve an Establishment

2562, 101 L. Ed. 2d 520 (1988), a case upon which all parties rely, the Court affirmed the *Flast* exception in an Establishment Clause challenge to grants made under the Adolescent Family Life Act ("AFLA"). The Court encountered no difficulty in finding that the plaintiff had authority to challenge the AFLA on its face:

> In *Flast v. Cohen*, . . . we held that federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution. Although we have considered the problem of standing and Article III limitations on federal jurisdiction many times since then, we have consistently adhered to *Flast* and the narrow exception it created to the general rule against taxpayer standing established in *Frothingham v. Mellon* . . . . Accordingly, in this case there is no dispute that appellees have standing to raise their challenge to the AFLA on its face.

487 U.S. at 618, 108 S. Ct. at 2579 (citations omitted).

The Court also found no impediment to standing was created by the involvement of an executive agency in disbursing the funds, in language that is directly relevant here:

Clause challenge but rather a charge of race discrimination. The Court held that parents of black children attending public schools in districts undergoing desegregation did not have standing to require judicial review of the sufficiency of Internal Revenue Service standards denying tax-exempt status to racially discriminatory private schools. Notably, the case was decided three years before *Bowen*.

> In subsequent cases, most notably *Tilton*, we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants. . . . The AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate. In this litigation there is thus a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the Secretary plays in administering the statute.

487 U.S. at 619-20, 108 S. Ct. at 2579-80 (footnote omitted).

There can be little question that the Medicare and Medicaid Acts are programs of disbursement of funds pursuant to Congress' taxing and spending power; indeed, the Church admits as much in its Answer.[30] There can also be little question that this claim is brought under the Establishment Clause, even though it implicates equal protection concerns. The requirement of neutrality in the Establishment Clause, which is squarely at issue here, "in its application requires an equal protection mode of analysis." *Olsen*, 878 F.2d at 1458, 1463 n.5 (quoting *Walz*, 397 U.S. at 696, 90 S. Ct. at 1425 (opinion of Harlan, J.)).

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[30] The Church admits, as it must, that Medicaid and Medicare payments to Christian Science sanitoria are derived from taxes "levied by the United States and spent by the United States." Answer of the First Church of Christ, Scientist ¶¶ 36, 69.

Even without reliance on *Flast*, the Church's standing argument fails. While it articulates the dissenters' position in *Kiryas Joel*, it is directly opposite to the contention of the majority, which this Court is obligated to follow. The majority stated:

> The dissent protests it is novel to insist "up front" that a statute not tailor its benefits to apply only to one religious group . . . but if this were so, *Texas Monthly, Inc.* would have turned out differently . . . and language in *Walz* . . . and *Bowen* . . . purporting to rely on the breadth of the statutory schemes would have been mere surplusage. Indeed, under the dissent's theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law.

___ U.S. at ___, 114 S. Ct. at 2494 (citations omitted). Thus, the Court need not, and should not, wait for such a plaintiff in order to determine whether the exemptions here violate the Establishment Clause in this manner.

C. Cases Cited by Defendants and the Church are Distinguishable

Defendants and the Church cite a variety of cases where the Court allowed direct grants of funds to be given to health care providers sponsored and operated by religious bodies, even by sectarian institutions. None of these cases condones the sect-specific exemptions at issue here. In *Bradfield v. Roberts*, 175 U.S. 291, 297-99, 20 S. Ct.

121, 123-24, 44 L. Ed. 168 (1899), the Supreme Court approved the specific appropriation by Congress of money to a hospital which would likely be "conducted under the auspices of the Roman Catholic Church." The Court emphasized at length, however, that the hospital was formed under an act of incorporation which did not even mention religion of any kind:

> Nothing is said about religion or about the religious faith of the incorporators of this institution in the act of incorporation. . . . The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. . . . That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. . . . There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. . . . The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution. . . . Its property is to be acquired in its own name and for its own purposes; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical

> authority whatever, but only to that of the government which created it.

175 U.S. at 297-99, 20 S. Ct. at 123-24 (emphasis added).

Here, of course, there is no dispute that the Church controls, to a large extent, the operation of the sanitoria. The secular charter in *Bradfield* showed "there is nothing sectarian in the corporation." The exemptions just as clearly demonstrate the sectarian character of the sanitoria, and that the Church is explicitly allowed to exercise its "ecclesiastical authority" over these institutions. This is not to say that allowing the Church the power to certify which sanitoria practice Christian Science medicine is an impermissible delegation of governmental authority, but only to emphasize that *Bradfield* cannot be extended to reach the present situation.

Defendants and the Church also cite a number of cases where health care benefits were allowed to flow to sectarian institutions. But an examination of the statutes at issue in those cases shows that the laws did not distinguish between sects, nor even between religious and non-religious institutions. The generic nature of these programs was emphasized in *Bowen v. Kendrick*, 487 U.S. 589, 608, 108 S. Ct. 2562, 2573, 101 L. Ed. 2d 520 (1988), where the contested statute was facially neutral "with respect to the grantee's status as a sectarian or purely secular institution." *Id.* The Supreme Court specifically found that "nothing on the face of the [statute] indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions" – the "possibility" that some proportion of funds provided by the statute would go to such institutions was not sufficient to

invalidate the statute on its face. 487 U.S. at 611, 108 S. Ct. at 2575. This principle was reaffirmed in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8, 113 S. Ct. 2462, 2466, 125 L. Ed. 2d 1 (1993): "we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."

On their faces, these programs are not neutral, and a portion of those institutions which receive benefits are defined with explicit reference to their religion. The authority cited by Defendants and the Church must be distinguished on that ground. Cf. *Mueller v. Allen*, 463 U.S. 388, 398-99, 103 S. Ct. 3062, 3069, 77 L. Ed. 2d 721 (1983) ("[A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."); *Wolman v. Walter*, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977) (statute which authorized funding for nonpublic schools, both sectarian and nonsectarian, was constitutional as to books, diagnostic services, and remedial and therapeutic services, but unconstitutional as to instructional materials and equipment and field trip services);[31] *Roemer v. Board of Public Works of Maryland*, 426

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[31] In *Wolman*, a case relied upon heavily by the Church and Defendants, the Court found that its previous decisions "contain a common thread to the effect that the provision of health services to all schoolchildren – public and nonpublic – does not have the primary effect of aiding religion." 433 U.S. at 242, 97 S. Ct. at 2602. The Court quoted *Lemon* for the proposition that the provision of public health serviced "in

U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976) (state statute authorizing payment of state funds to colleges and universities in general, providing that no funds "shall be utilized by the institutions for sectarian purposes," was constitutional); *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973) (statute forming Authority for construction and financing of educational facilities, which excluded "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination," was constitutional in light of lack of evidence that facilities were pervasively sectarian); *Tilton v. Richardson*, 403 U.S. 672, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) (grants made under Higher Education Facilities Act of 1963 to church-related colleges were constitutional, but provision limiting recipients' obligation not to use federally financed facilities for sectarian purposes for twenty years struck down, as 20-year provision would allow federal funds to advance religion after that period).

The sect-specific distinctions made in the exemptions "cross[ ] the line from permissible accommodation to

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common to all students" was "not thought to offend the Establishment Clause." *Id.* (quoting *Lemon*, 403 U.S. at 616-17, 91 S. Ct. at 2113). The exemptions, however, afford Christian Scientists the option of treatment at religiously-affiliated institutions which do not have to follow the normal rules applicable to other institutions such as Lutheran or Catholic hospitals or nursing homes. In other words, the health services are not provided "in common" with the rest of the American citizenry.

impermissible establishment." *Kiryas Joel*, ___ U.S. at ___, 114 S. Ct. at 2494. In doing so, the Court does not blind itself to the evident problem of Christian Scientists having to pay Medicare and Medicaid taxes while not receiving the benefits of these programs at Christian Science sanitoria. Yet the accommodation as drawn smacks of religious favoritism which cannot be countenanced under the Establishment Clause.

The governmental interest in providing basic care and services to all eligible citizens is a compelling one. The Christian Scientists are not receiving benefits which are unavailable to outsiders – other recipients of Medicaid and Medicare are aided by government payment for bed and board, and for nursing services and supplies.[32] They are receiving these benefits, however, by virtue of acts of the federal government which apply to only one religious group.

Legislative accommodation of religious beliefs is a valuable and worthy enterprise, but here, applying Supreme Court precedent, the accommodation has gone too far, and too strongly favors the convictions of one particular sect. The Court does not doubt that Christian Scientists enjoy the largest and most prominent network of religiously-based alternative care institutions in the country. But to bestow a benefit upon only these particular institutions does not comport with the basic constitutional requirement of neutrality among religions.

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[32] *See* Ault Decl. ¶ 7; HCFA Christian Science Supplement §§ CS-200(D); 204(A).

V. The Requested Relief

The Court is fully aware of the impact of its ruling. Exemptions on which Christian Scientists and the Church have relied for more than twenty-five years have been determined to be invalid. The consequences for past, current, and future patients at Christian Science sanitoria may be substantial, and the impact on the Church may be formidable. Yet these considerations are not properly part of this Court's constitutional analysis. The fact that this practice may be long-standing does not convert an unconstitutional practice into a constitutional one.

Plaintiffs request injunctive relief designed to prevent use of the exemptions to determine eligibility for Medicare and Medicaid benefits, and designed to prevent payment of benefits based on the exemptions. Plaintiffs are entitled to such relief. Yet given the potential impact such an injunction would generate, and the certainty of an appeal, the Court will suspend such injunctive relief. *See* Fed. R. Civ. P. 62(c).

Conclusion

Accordingly, based on the foregoing, and all of the records, files, and proceedings herein, **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc. No. 25) is **DENIED**, that Defendant-Intervenor First Church of Christ, Scientist's Motion for Summary Judgment (Doc. No. 28) is **DENIED**, and that Plaintiffs' Motion for Summary Judgment (Doc. No. 3) is **GRANTED**. **IT IS FURTHER ORDERED** that the following fifteen regulatory and statutory provisions **ARE**

HEREBY DECLARED UNCONSTITUTIONAL, INVALID, AND UNENFORCEABLE.

The affected statutory provisions are:

1) That portion of 42 U.S.C. § 1395x(e) which provides:

> The term "hospital" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations.

2) That portion of 42 U.S.C. § 1395x(y)(1) which provides:

> The term "skilled nursing facility" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to items and services ordinarily furnished by such an institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations.

3) 42 U.S.C. § 1320c-11, providing: "The provisions of this part shall not apply with respect to a Christian Science sanitorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

4) That portion of 42 U.S.C. § 1396a(a) which provides: "The provisions of paragraphs (9)(A), (31), and (33) and of section 1396b(i)(4) of this title shall not apply to a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

5) That portion of 42 U.S.C. § 1396g(e)(1) which provides that the definition of "nursing home" "does not include a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

The affected regulatory provisions are:

1) That portion of 42 C.F.R. § 466.1 which defines "hospital" to mean a health care institution "other than a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

2) That portion of 42 C.F.R. § 431.610(b) which provides: "The requirement for establishing and maintaining standards does not apply with respect to Christian Science sanitoria operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass."

3) That portion of 42 C.F.R. § 440.155(b)(1) which provides that "nursing facility services" include services "considered appropriate by the State and provided by a

Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass."

4) 42 C.F.R. § 440.170(b), providing:

> Services of Christian Science nurses. "Services of Christian Science nurses" mean services provided by nurses who are listed and certified by the First Church of Christ, Scientist, Boston, Mass., if –
>
> (1) The services have been requested by the recipient; and
>
> (2) The services are provided –
>
> (i) By or under the supervision of a Christian Science visiting nurse organization listed and certified by the First Church of Christ, Scientist, Boston, Mass.;
>
> (ii) As private duty services to a recipient in his own home or in a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass., if the recipient requires individual and continuous care beyond that available from a visiting nurse or that routinely provided by the nursing staff of the sanatorium.

5) 42 C.F.R. § 440.170(c), providing:

> Services in Christian Science sanatoriums. "Services in Christian Science sanatoriums" means

services provided in Christian Science sanatoriums that are operated by, or listed and certified by, the First Church of Christ, Scientist, Boston, Mass.

6) 42 C.F.R. § 442.12(b), providing:

Exception. The certification requirement of paragraph (a) of this section does not apply with respect to Christian Science sanitoria operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass.

7) That portion of 42 C.F.R. § 456.251, in defining "skilled nursing facility services," which "excludes those services if they are provided in Christian Science sanitoria."

8) That portion of 42 C.F.R. § 456.351, in defining "intermediate care facility services," which "excludes those services if they are provided in Christian Science sanitoria."

9) That portion of 42 C.F.R. § 456.601, in defining "intermediate care facility," which "excludes Christian Science sanatoria operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass."

10) That portion of 42 C.F.R. § 431.701, in defining "nursing home," which states that the term does not include "(a) A Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Mass."

Defendants are **ENJOINED** from using of the foregoing provisions to determine eligibility for benefits, and from paying benefits based on the exemptions; however,

this injunctive relief is **STAYED** until the time for appealing from this Memorandum Opinion and Order has expired, and if an appeal is taken from this Memorandum Opinion and Order, the stay will be continued throughout the pendency of the appeal.

LET JUDGMENT BE ENTERED ACCORDINGLY.

August 7, 1996
RICHARD H. KYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3521MNMI

Children's Healthcare, etc., et al.,	*	
Appellants,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Nancy-Ann Min De Parle, etc., et al.,	*	
Appellees.	*	

The petition for rehearing en banc is denied. Judge McMillian and Judge Richard S. Arnold would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

August 29, 2000

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

ADDENDUM OF STATUTES AS AMENDED BY SECTION 4454 OF THE BALANCED BUDGET ACT OF 1997

1) That portion of 42 U.S.C. § 1395x(e):

"The term 'hospital' also ~~includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts~~, *includes a religious nonmedical health care institution (as defined in subsection (ss)(1))*, but only with respect to items and services ordinarily furnished by such institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise applicable) as may be provided in regulations *consistent with section 1821.*"

2) 42 U.S.C. § 1395x(y)(1):

Extended Care in Religious Nonmedical Health Care Institutions

"The term 'skilled nursing facility' ~~also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts~~, *includes a religious nonmedical health care institution (as defined in subsection (ss)(1))*, but only with respect to items and services ordinarily furnished by such an institution to inpatients, and payment may be made with respect to services provided by or in such an institution only to such extent and under such conditions, limitations, and requirements (in addition to or in lieu of the conditions, limitations, and requirements otherwise

applicable) as may be provided in regulations *consistent with section 1821."*

3) That portion of 42 U.S.C. § 1396a(a):

The provisions of paragraphs (9)(A), (31), and (33) [42 U.S.C. §§ 1396a(a)(9)(A), (31) and (33)] and of section 1903(i)(4) [42 U.S.C. § 1396b(i)(4)] shall not apply ~~to a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts.~~ *to a religious nonmedical health care intsitution (as defined in section 1861 (ss)(1)).*

4) 42 U.S.C. § 1396g(e)(1):

(e) As used in this section, the term –

(1) 'nursing home' means any institution or facility defined as such for licensing purposes under State law, or, if State law does not employ the term nursing home, the equivalent term or terms as determined by the Secretary, but does not include ~~a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts~~; *a religious nonmedical health care institution (as defined in section 1861 (ss)(1)).*

5) 42 U.S.C. § 1320c-11:

exemptions for religious nonmedical health care institutions

The provisions of this part shall not apply with respect to a ~~Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts~~. *religious nonmedical health care institution (as defined in section 1861 (ss)(1)).*

6) 42 U.S.C. § 1395x(ss)(1):

(ss)(1) The term 'religious nonmedical health care institution' means an institution that –

(A) is described in subsection (c)(3) of section 501 of the Internal Revenue Code of 1986 and is exempt from taxes under subsection (a) of such section;

(B) is lawfully operated under all applicable Federal, State, and local laws and regulations;

(C) provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs;

(D) provides such nonmedical items and services exclusively through nonmedical nursing personnel who are experienced in caring for the physical needs of such patients;

(E) provides such nonmedical items and services to inpatients on a 24-hour basis;

(F) on the basis of its religious beliefs, does not provide through its personnel or otherwise medical items and services (including any medical screening, examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients;

(G)(i) is not owed by, under common ownership with, or has an ownership interest in, a provider of medical treatment of services;

(ii) is not affiliated with –

(I) a provider of medical treatment or services, or

(II) an individual who has an ownership interest in a provider of medical treatment or services;

(H) has in effect a utilization review plan which –

(i) provides for the review of admissions to the institution, of the duration of stays therein, of cases of continuous extended duration, and of the items and services furnished by the institution,

(ii) requires that such reviews be made by an appropriate committee of the institution that includes the individuals responsible for overall administration and for supervision of nursing personnel at the institution,

(iii) provides that records be maintained of the meetings, decisions, and actions of such committee, and

(iv) meets such other requirements as the Secretary finds necessary to establish an effective utilization review plan;

(I) provides the Secretary with such information as the Secretary may require to implement section 1821, including information relating to quality of care and coverage determinations; and

(J) meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.

(2) To the extent that the Secretary finds that the accreditation of an institution by a State, regional, or national agency or association provides reasonable assurances that any or all of the requirements of paragraph (1) are met or exceeded, the Secretary may treat such institution as meeting the condition

or conditions with respect to which the Secretary made such finding.

(3)(A)(i) In administering this subsection and section 1821, the Secretary shall not require any patient of a religious nonmedical health care institution to undergo medical screening, examination, diagnosis, prognosis, or treatment or to accept any other medical health care service, if such patient (or legal representative of the patient) objects thereto on religious grounds.

(ii) Clause (i) shall not be construed as preventing the Secretary from requiring under section 1821(a)(2) the provision of sufficient information regarding an individual's condition as a condition for receipt of benefits under part A for services provided in such an institution.

(B)(i) In administering this subsection and section 1821, the Secretary shall not subject a religious nonmedical health care institution or its personnel to any medical supervision, regulation, or control, insofar as such supervision, regulation, or control would be contrary to the religious beliefs observed by the institution or such personnel.

(ii) Clause (i) shall not be construed as preventing the Secretary from reviewing items and services billed by the institution to the extent the Secretary determines such review to be necessary to determine whether such items and services were not covered under part A, are excessive, or are fraudulent.

(4)(A) For purposes of paragraph (1)(G)(i), an ownership interest of less than 5 percent shall not be taken into account.

(B) For purposes of paragraph (1)(G)(ii), none of the following shall be considered to create an affiliation:

(i) An individual serving as an uncompensated director, trustee, officer, or other member of the governing body of a religious nonmedical health care institution.

(ii) An individual who is a director, trustee, officer, employee, or staff member of a religious nonmedical health care institution having a family relationship with an individual who is affiliated with (or has an ownership interest in) a provider of medical treatment or services.

(iii) An individual or entity furnishing goods or services as a vendor to both providers of medical treatment or services and religious nonmedical health care institutions.

7) 42 U.S.C. § 1395i-5:

5. CONDITIONS FOR COVERAGE OF RELIGIOUS NONMEDICAL HEALTH CARE INSTITUTIONAL SERVICES

(a) IN GENERAL – Subject to subsections (c) and (d), payment under this part may be made for inpatient hospital services or post-hospital extended care services furnished an individual in a religious nonmedical health care institution only if –

(1) the individual has an election in effect for such benefits under subsection (b); and

(2) the individual has a condition such that the individual would qualify for benefits under this part for inpatient hospital services or extended care services, respectively, if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not such an institution.

(b) ELECTION –

(1) IN GENERAL – An individual may make an election under this subsection in a form and manner specified by the Secretary consistent with this subsection. Unless otherwise provided, such an election shall take effect immediately upon its execution. Such an election, once made, shall continue in effect until revoked.

(2) FORM – The election form under this subsection shall include the following:

(A) A written statement, signed by the individual (or such individual's legal representative), that –

(i) the individual is conscientiously opposed to acceptance of nonexcepted medical treatment; and

(ii) the individual's acceptance of nonexcepted medical treatment would be inconsistent with the individual's sincere religious beliefs.

(B) A statement that the receipt of nonexcepted medical services shall constitute a revocation of the election and may limit further receipt of services described in subsection (a).

(3) REVOCATION – An election under this subsection by an individual may be revoked by voluntarily notifying the Secretary in writing of such revocation and shall be deemed to be revoked if the individual receives nonexcepted medical treatment for which reimbursement is made under this title.

(4) LIMITATION ON SUBSEQUENT ELECTIONS – Once an individual's election under this subsection has been made and revoked twice –

(A) the next election may not become effective until the date that is 1 year after the date of most recent previous revocation, and

(B) any succeeding election may not become effective until the date that is 5 years after the date of the most recent previous revocation.

(5) EXCEPTED MEDICAL TREATMENT – For purposes of this subsection:

(A) EXCEPTED MEDICAL TREATMENT – The term 'excepted medical treatment' means medical care or treatment (including medical and other health services) –

(i) received involuntarily, or

(ii) required under Federal or State law or law of a political subdivision of a State.

(B) NONEXCEPTED MEDICAL TREATMENT – The term 'nonexcepted medical treatment' means medical care or treatment (including medical and other health services) other than excepted medical treatment.

(c) MONITORING AND SAFEGUARD AGAINST EXCESSIVE EXPENDITURES –

(1) ESTIMATE OF EXPENDITURES – Before the beginning of each fiscal year (beginning with fiscal year 2000), the Secretary shall estimate the level of expenditures under this part for services described in subsection (a) for that fiscal year.

(2) ADJUSTMENT IN PAYMENTS –

(A) PROPORTIONAL ADJUSTMENT – If the Secretary determines that the level estimated under paragraph (1) for a fiscal year will exceed the trigger level (as defined in subparagraph (C)) for that fiscal year, the Secretary shall, subject to subparagraph (B), provide for such a

proportional reduction in payment amounts under this part for services described in subsection (a) for the fiscal year involved as will assure that such level (taking into account any adjustment under subparagraph (B)) does not exceed the trigger level for that fiscal year.

(B) ALTERNATIVE ADJUSTMENTS – The Secretary may, instead of making some or all of the reduction described in subparagraph (A), impose such other conditions or limitations with respect to the coverage of covered services (including limitations on new elections of coverage and new facilities) as may be appropriate to reduce the level of expenditures described in paragraph (1) to the trigger level.

(C) TRIGGER LEVEL – For purposes of this subsection –

(i) IN GENERAL – Subject to adjustment under paragraph (3)(B), the 'trigger level' for a year is the unadjusted trigger level described in clause (ii).

(ii) UNADJUSTED TRIGGER LEVEL – The 'unadjusted trigger level' for –

(I) fiscal year 1998, is $20,000,000, or

(II) a succeeding fiscal year is the amount specified under this clause for the previous fiscal year increased by the percentage increase in the consumer price index for all urban consumers (all items; United States city average) for the 12-month period ending with July preceding the beginning of the fiscal year.

(D) PROHIBITION OF ADMINISTRATIVE AND JUDICIAL REVIEW – There shall be no administrative or judicial review under section 1869, 1878, or otherwise of the estimation of expenditures under subparagraph (A) or the application of reduction amounts under subparagraph (B).

(E) EFFECT ON BILLING – Notwithstanding any other provision of this title, in the case of a reduction in payment provided under this subsection for services of a religious nonmedical health care institution provided to an individual, the amount that the institution is otherwise permitted to charge the individual for such services is increased by the amount of such reduction.

(3) MONITORING EXPENDITURE LEVEL –

(A) IN GENERAL – The Secretary shall monitor the expenditure level described in paragraph (2)(A) for each fiscal year (beginning with fiscal year 1999).

(B) ADJUSTMENT IN TRIGGER LEVEL –

(i) IN GENERAL – If the Secretary determines that such level for a fiscal year exceeded, or was less than, the trigger level for that fiscal year, then, subject to clause (ii), the trigger level for the succeeding fiscal year shall be reduced, or increased, respectively, by the amount of such excess or deficit.

(ii) LIMITATION ON CARRYFORWARD – In no case may the increase effected under clause (i) for a fiscal year exceed $50,000,000.

(d) SUNSET – If the Secretary determines that the level of expenditures described in subsection (c)(1) for 3 consecutive fiscal years (with the first such year being not earlier than fiscal year 2002) exceeds the trigger level for such expenditures for such years (as determined under subsection (c)(2)), benefits shall be paid under this part for services described in subsection (a) and furnished on or after the first January 1 that occurs after such 3 consecutive years only with respect to an individual who has an election in effect under subsection (b) as of such January 1 and only during the duration of such election.

(e) ANNUAL REPORT – At the beginning of each fiscal year (beginning with fiscal year 1999), the Secretary shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate an annual report on coverage and expenditures for services described in subsection (a) under this part and under State plans under title XIX. Such report shall include –

(1) level of expenditures described in subsection (c)(1) for the previous fiscal year and estimated for the fiscal year involved;

(2) trends in such level; and

(3) facts and circumstances of any significant change in such level from the level in previous fiscal years.

[SEAL]

Office of the Attorney General
Washington, D.C. 20530

January 23, 1997

The Honorable Thomas B. Griffith
Senate Legal Counsel
United States Senate
Washington, DC 20510-7250

Dear Mr. Griffith:

Pursuant to 2 U.S.C. 288k(b), I am writing to advise you that, after extensive deliberation, I have determined that the Department of Justice cannot continue a defense of certain provisions of the Medicare and Medicaid Acts. Those sections provide special reimbursement, without federal or state oversight of expenditures, exclusively for Christian Science nursing services received in sanatoria "operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."[1] These statutory provisions have been challenged for the first time in the case of *Children's Healthcare Is a Legal Duty (CHILD)* v. *Vladeck*, Civil No. 3-96-63 (D. Minn.), appeal pending, Nos. 96-3936, -3938 (8th Cir.). In our view, the provisions cannot be defended under the Supreme Court's current Establishment Clause jurisprudence.

The Litigation in Question

Children's Healthcare Is a Legal Duty ("CHILD") is an Iowa child advocacy organization. CHILD and two

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[1] A summary of those provisions is appended as an attachment to this letter.

individuals filed suit against the Secretary of Health and Human Services and the Director of the Health Care Finance Administration challenging as Establishment Clause violations those parts of the Medicare and Medicaid Acts that provide federal funding for services received in Christian Science sanatoria. The First Church of Christ, Scientist "the Church") intervened as a party defendant.

On August 7, 1996, the district court declared the statutory provisions, and their accompanying regulations, violative of the Establishment Clause as an impermissible sectarian preference, and enjoined the Secretary from further implementation of them in determining eligibility for benefits under Medicare and Medicaid. The district court rejected the Church's request that the statutory and regulatory provisions simply be expanded to embrace all similarly situated religious groups. A copy of the district court's decision is attached for your convenience.

The district court stayed its injunction pending appeal, and the Secretary is continuing to administer the program. Both the Church and the Department of Justice filed notices of appeal from the district court's decision. Although we defended these provisions in district court, upon further review I have determined that this defense cannot be maintained under the Supreme Court's Establishment Clause jurisprudence, particularly its most recent precedents.

Operation of Christian Science Sanatoria

As the record in the case establishes, Christian Science theology teaches that physical illness is a manifestation of internal spiritual imbalance. As a consequence, Christian Scientists believe that hearing for disease and illness should come through prayer, rather than secular medical treatment. Medical treatment, in fact, is deemed to be counterproductive because it diverts attention and energy from prayerful recovery. Christian Scientists can, and often do, hire Christian Science practitioners to pray for them. The Church certifies practitioners and publishes their names in its monthly journal. Listed practitioners charge a daily fee for their services.

In lieu of hospitalization, Christian Scientists who are ill may enter sanatoria, which are certified and licensed by the Church. To qualify for official Church accreditation, these sanatoria must operate in a manner "consistent with the Church's view of the religious and moral teachings of Christian Science and with the policies and standards of the Church" (Plaintiffs' reply Mem. at 12). These sanatoria provide no medical care, but they do offer room and board and the services of Christian Science nurses. These nurses need not be professionally licensed; instead, their names must be published in the Christian Science Journal. The qualifications for listing in the Journal are "a demonstrable knowledge of Christian Science practice" and a capacity to take care of the sick. The nurses do not perform medical nursing services.

Patients need not be Christian Scientists to be admitted to a sanatorium. Medicare patients, however, must be under the care of a Journal-listed prayer practitioner.

They must also require Christian Science nursing services on an inpatient basis. The Church currently licenses 23 sanatoria in the United States.

Operation of Medicare and Medicaid

As you know, Medicare is a federally funded program to provide "basic protection against the costs of hospital, related post-hospital, home health services, and hospice care" for persons over 65 and the disabled. 42 U.S.C. 1395c. The services covered generally encompass medical care under the direction of a physician or registered professional nurse, either in a hospital or at home following hospitalization. 42 U.S.C. 1395d, 1395f, 1395i-3. Nonmedical services, such as room and board and nursing services, are covered only as incidents of medical care. 42 U.S.C. 1395i-3(a) (6), 1395x(m). Payments for custodial care and personal comfort items are excluded. 42 U.S.C. 1395y. The statute provides no general authorization for the payment of nursing care, such as in a nursing home, outside the context of physician-supervised medical treatment. Participating hospitals must satisfy a variety of regulatory criteria governing the provision of licensed physician and nursing care, and they must also operate a utilization and quality control review committee that reviews the need for hospitalization of Medicare patients. 42 U.S.C. 1320c.

Although Medicare does not otherwise pay for nursing services unaffiliated with hospital or physician-supervised case, Congress included in the Medicare statute a special provision for certain Christian Science sanatoria. Congress included those sanatoria "operated, or listed

and certified, by the First Church of Christ, Scientist, Boston, Massachusetts" in the definitions of hospitals and skilled nursing facilities eligible to participate in Medicare. 42 U.S.C. 1395x(e), 1395x(y) (1). These sanatoria are also specifically exempted from Medicare's utilization and quality control review requirements. 42 U.S.C. 1320c-11.

Medicaid is a joint federal-state program designed to provide "medical assistance" and rehabilitation services to the indigent. 42 U.S.C. 1396. States participating in Medicaid must provide a variety of medical services to the needy. Medicaid also authorizes States to provide for the expenses of remedial care that has been "specified by the Secretary." 42 U.S.C. 1396d(a) (25). The Medicaid statute exempts Christian Science sanatoria, by name, from many of the Act's regulatory and oversight procedures. 42 U.S.C. 1396a(A), 1396g(e) (1).

Establishment Clause Infirmities of the Challenged Provisions

The Supreme Court has stated that the "clearest command of the Establishment Clause" is that "one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); see also *Epperson* v. *Arkansas*, 393 U.S 97, 104, 106 (1968) ("The State may not adopt programs or practices * * * which aid or oppose any religion * * * . This prohibition is absolute."). The Establishment Clause "compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others not religious adherents collectively over nonadherents." *Board of Educ. of Kiryas*

Joel Village Sch. Dist. v. *Grumet*, 512 U.S. 687, 696 (1994) (plurality opinion) (internal quotation marks and citation omitted); see also 512 U.S. at 714-715 (O'Connor, J., concurring in the judgment).

The Supreme Court has held that when a statute favors or disfavors particular religious groups, the law must be narrowly tailored and advance a compelling state interest. *E.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-532 (1993); *Larson*, 456 U.S. at 246 ("when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny"); see also *Kiryas Joel*, 512 U.S. at 706-707.[2]

1. We do not believe that the Medicare and Medicaid provisions' facial preference for practices approved by the official hierarchy of the Christian Scientist Church can be defended under this searching level of inquiry. Although the district court found a compelling interest in accommodating religion generally, the Supreme Court has directed that the compelling interest inquiry must be more narrowly focused. Accordingly, the government must demonstrate that Congress has a compelling interest in the particular accommodation that it has drawn – that is, in accommodating only sanatoria certified by the First Church of Christ, Scientist, in Boston, Massachusetts. See *Larson*, 456 U.S. at 248 ("[O]ur inquiry must focus more narrowly, upon the distinctions drawn by [the statute]

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[2] The *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), test is generally reserved for evaluating laws that impact all religions uniformly. *Larson*, 456 U.S. at 252.

itself."). We do not believe the federal government can advance an articulable compelling interest in this case, for two reasons.

First, Medicare and Medicaid are not programs designed generally to compensate for nursing care (and especially non-medical nursing care), unaffiliated with medical treatment under the care of a physician. We recognize Congress's laudable motives in expanding coverage to Christian Science sanatoria in order to make the two programs more universal in their coverage. Nevertheless, to the extent universal coverage was Congress's goal, the government has no compelling interest in confining payment for non-medical nursing services to members of one faith. If Congress wished to provide parallel coverage universally for all persons who are religiously motivated to forego traditional medical care, then the language of the provisions should have been crafted to embrace all faiths. *Kiryas Joel*, 512 U.S. at 706-707 ("[W]hatever the limits of permissible legislative accommodations may be, * * * it is clear that neutrality as among religions must be honored."). Under controlling Supreme Court precedent, the government can have no articulable interest in guaranteeing non-medical services only for Christian Scientists and requiring everyone else, regardless of their religious beliefs, to accept medical services as a prerequisite for ancillary services.

We understand that the language of the provisions may have been limited to Christian Scientists because that was the only group that requested such treatment from Congress during hearings on the legislation. See *Health Services for the Aged under the Social Security Insurance System: Hearings Before the Comm. on Ways and Means*

of the House of Representatives, 87th Cong., 1st Sess. 727-730 (1961) (testimony of Dr. J. Burroughs Stokes). Nevertheless, with respect to legislation affecting religion, the Supreme Court finds a distinct Establishment Clause value in requiring the legislature to write laws in neutral terms and thus to accept the consequences if and when adherents of other faiths later appear on the scene with similar claims for relief. "[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon [one group of adherents] must be imposed generally." *Larson*, 456 U.S at 245-246 (quoting *Railway Express Agency* v. *New York*, 336 U.S 106, 112 (1949) (Jackson, J., concurring)). Cf. *Kiryas Joel*, 512 U.S. at 703 & n.7 (sect-specific act of legislature to assist one religious group by creating a special school district disapproved; creation of village comprised of same religious adherents through use of neutral state law for municipal incorporation approved). Requiring sectarian-neutral terms in legislation ensures that religious protection does not depend upon the fortuity of legislative familiarity with the faith in question.

The fact that all of the other religious accommodation provisions in the Medicare and Medicaid Acts are written in sectarian neutral terms necessarily affects analysis of the validity of these textually sect-specific provisions. Cf. 42 U.S.C. 300a-7(b), 300a-7(c) (religious or moral objections to abortion services); 42 U.S.C. 1396f (States may not compel submission to particular medical services if they are contrary to patient's faith); 26 U.S.C. 1402(g) (exemption from Social Security taxes for persons religiously

opposed to payment of taxes and affiliated with an organized religious group that provides comparable support).[3]

Second, even if we could convince the court that the government had a compelling interest in funding only Christian Scientists' requests for general nursing services, we can articulate no compelling interest in funding exclusively those nurses listed by "the First Church of Christ, Scientist, Boston, Massachusetts," working in sanatoria approved by "the First Church of Christ, Scientist, Boston, Massachusetts," for patients under the care of prayer practitioners certified by "the First Church of Christ, Scientist, Boston, Massachusetts." Medicare and Medicaid provide benefits for individuals, not established groups. The only relevant interest of the government would be that those persons opposed to medical services receive quality non-medical nursing services in lieu of medical treatment. The government has no articulable secular interest in denying Medicare benefits to a Christian Scientist who receives such services from a state-licensed nursing home or state-licensed nurses, while granting benefits to a Christian Scientist who receives those same services

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[3] In the brief we recently filed in the Supreme Court defending the constitutionality of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb *et seq.*, we emphasized that RFRA promotes Establishment Clause values because it applies equally to all faiths and avoids the constitutional risks attendant on a system of piecemeal, state-by-state, sect-specific laws accommodating religion. See Brief for United States, *City of Boerne* v. *Flores*, No. 95-2074, at 43-44 (filed Jan. 10, 1997) (a copy is enclosed for your convenience).

from nurses bearing the official imprimatur of the Church in a sanatorium approved by the Church.

Thus, these provisions raise the substantial concern that, while they aid Christian Scientists in the exercise of their beliefs, they also significantly advance the interests of the official church by requiring members who seek Medicare or Medicaid benefits to receive their nursing services in locations approved by the official Church under the supervision of nurses and prayer practitioners endorsed by the Church. Eligibility turns not only on the need for or the quality of services, but also on whether the services provided bear the Church's stamp of approval. A disaffected Christian Scientist, A Christian Scientist too ill to travel, or a Christian Scientist who either does not wish to use, or cannot afford to pay for, the services of a listed prayer practitioner (and is thus unable to gain admission to an official sanatorium) has no claim to Medicare or Medicaid benefits. The Establishment Clause concerns triggered by such provisions are accentuated by the fact that they also are in sharp tension with Medicare's guarantee of free choice to patients in selecting health care institutions. 42 U.S.C. 1395a.

The Supreme Court has made clear that the Establishment Clause forbids such a fusion of governmental and ecclesiastical power. *Larkin* v. *Grendel's Den*, 459 U.S. 116, 123-127 (1982) (State may not give churches veto over liquor licenses). As the Supreme Court plurality stated in *Kiryas Joel*, 512 U.S. at 698, 699, "a State may not delegate its civic authority to a group chosen according to a religious criterion"; "[i]f New York were to delegate civic authority to 'the Grand Rebbe,' *Larkin* would obviously

require invalidation."[4] See also 512 U.S. at 728-730 (Kennedy, J., concurring in the judgment). The delegation of governmental power to the First Church of Christ, Scientist, to identify those services eligible for reimbursement under Medicare and Medicaid "inescapably implicates the Establishment Clause." *Larkin*, 459 U.S. at 123. Furthermore, Congress has not provided the Church any objective criteria by which to evaluate covered services. The Church's power "is standardless, calling for no reasons, findings, or reasoned conclusions." *Id.* at 125. There is no guarantee that the decision as to which services are covered will be made in a "secular, neutral, and nonideological" manner. *Ibid.* To the Contrary, adherence to official Church doctrine is a criterion for certification employed by the Church.[5]

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[4] See also *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1343-1346 (4th Cir. 1995) (municipality may not empower council of Rabbis and three designees of Orthodox Jewish organizations to establish and enforce kosher food standards); *id.* at 1349-1350 (Wilkins, J., concurring) (obligation of intra-sect neutrality violated); *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1360-1365 (N.J. 1992) (same).

[5] The concerns raised by the provisions are underscored by reference to precedents setting out limits on federal funding of religious activity. Under Medicare and Medicaid, the federal and/or state governments directly pay hospitals and thus Christian Science sanatoria for services rendered. "[S]pecial Establishment clause dangers" arise whenever "the government makes direct money payments to sectarian institutions." *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2523 (1995). These concerns are particularly acute when, as here, the federal money would fiance pervasively sectarian activity. See *Bowen v. Kendrick*, 487 U.S. 589, 609-622 (1988). Normally, such a program is justified on the ground that "[a]ny aid provided under [the] program that ultimately flows to religious

2. We also cannot defend these provisions as an accommodation in the tradition of *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas* v. *Review Bd.*, 450 U.S 707, 717 (1981); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). Indeed, to do so would open to challenge most, if not all, government benefit programs – federal, state, or local – on the grounds that some group or person is unable, for religious reasons, to accept the benefits offered.

Traditionally, accommodation involves the lifting of a governmental burden – a proscription or prescription of particular conduct – from the individual. See, *e.g.*, *Corporation of Presiding Bishop* v. *Amos*, 483 U.S 327 (1987) (relieving religious organizations from Title VII's prohibition on religious discrimination in employment); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (releasing Amish from criminal law that required school attendance); *Walz* v. *Tax Commission*, 397 U.S 664 (1970) (exemption from property tax for all non-profit groups); *Zorach* v. *Clauson*, 343 U.S

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institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters* v. *Washington Dep't of Servs. for Blind*, 474 US 481, 487 (1986). Under these circumstances, however, the private choice of Christian Scientists is constrained by Congress. Compensation will only be provided if the Christian Scientist selects services officially approved by the Church and receives them in a sanatorium officially approved by the Church and under the care of a Christian Science prayer practitioner who is also approved by the Church. Because federal law plays an important part in directing federal funds to a pervasively sectarian institution to pay for activities infused with religious content, the Medicare and Medicaid provisions likely run afoul of the Establishment Clause's funding limitations.

306 (19852) (releasing students from public school to receive off-site religious education).[6] Such accommodations simply leave persons free to pursue private, religious conduct independent of the government.

One type of government burden that might justify a religion-specific accommodation occurs where the government formulates "eligibility provisions" for a benefit program that discriminate against religious conduct or coerce the abandonment of activities compelled by faith. *Sherbert*, 374 U.S. at 410; *See also Frazee* v. *Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832-833 (1989); *Hobbie*, 480 U.S. at 144; *Thomas*, 450 U.S. at 717-718. These cases require that government accord religious exercise sufficient respect and stature that such conduct will not disqualify adherents from generally available benefits (at least in the absence of a compelling interest).

The eligibility requirements for Medicare and Medicaid – age, disability, and indigency – clearly do not, in any sense, burden or exclude Christian Scientists or treat religious adherents any differently from other applicants. The Church thus cannot challenge the eligibility provisions of Medicare and Medicaid on the ground that they violate *Sherbert* and must be expanded to accommodate Christian Scientists.

Instead, these provisions go further and allow a single religious group (or its hierarchy) to alter the content

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[6] The exemption from social security taxes for some religious groups, 26 U.S.C. 1402(g), also fits this bill. See *United States* v. *Lee*, 455 U.S. 252, 257 (1982) mere payment of social security taxes violates religious beliefs of the Amish).

of the benefits received from the government. The provisions at issue here change the content of the benefit being offered from medical services to non-medical care. The Supreme Court has not indicated that accommodation may extend to the provision of special benefits. Certainly the decision in *Kiryas Joel* indicates that at least the provision of special benefits to a single sect is impermissible.

This important distinction – between government denying persons access to or eligibility for a secular benefit because of their religious conduct, and government offering a secular benefit that certain persons eschew for religious reasons – is reflected in the case law. Precedent addressing the former limits government's power to control eligibility for its programs and benefits in a manner that penalizes religious conduct. See *Sherbert* v. *Verner*. Precedent addressing the latter protects government's discretion to define the scope of its benefit program in the first instance. Cf. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (while government can define the scope of a speech forum in the first instance, once it does so it may not discriminate against religious viewpoints in granting access to the forum); *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Here, the federal government has not conditioned Christian Scientists' *eligibility* for a secular governmental benefit on conduct proscribed by their religious faith; it has simply offered a benefit – medical care – the *content* of which they choose, for religious reasons, not to accept. Cf. *Johnson* v. *Robison*, 415 U.S. 361 (1974); see also *Lee*, 455 U.S at 261 ("every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs").

Next Steps

While the Department of Justice will not be able to defend these Christian Science provisions before the United States Court of Appeals for the Eighth Circuit, we anticipate playing a continued role in the litigation. The appeal will go forward both because the Secretary and Administrator of HCFA will maintain their appeal of the orders entered against them (even though they will take the position that the provisions are unconstitutional, compare *INS v. Chadha*, 462 U.S. 919, 929-931 (1983)), and because the Church, as an intervening defendant, has separately appealed and intends to defend the provisions. Because the Secretary will continue to administer the program consistent with the statute pending resolution of the appeal, our decision against continued defense of the statutory provisions will not render the appeal moot.

We also anticipate filing a brief that outlines the constitutional difficulties with these provisions, consistent with out duty of candor as representatives of the United States and as officers of the court. But we will also, as part of our analysis, defend Congress's general power to accommodate religious exercise and outline the broad scope of that authority. We wish to ensure that the decision of the court of appeals not erode or unduly intrude upon Congress's power in this regard.

In addition, we note that the Church has argued that the court should repair the Establishment Clause violation by unilaterally expanding the provisions to embrace all similarly situated faiths. We will continue to oppose that judicially-imposed remedy because we believe that

any decision to expand Medicare and Medicaid's coverage for non-medical nursing services should be made in the first instance by Congress, not the courts, which lack Congress's unique institutional capacity to collect the evidence relevant to such a decision, to evaluate resource constraints, and to balance the competing policy considerations.

As you know, President Clinton is committed to protecting religious freedom and to appropriate governmental accommodation of the needs of religious adherents. We respect and support the motivations that no doubt underlay the extension of a substitute for Medicare and Medicaid to Christian Science adherents. The Department of Justice is available to assist Congress, if it so desires, in attempting to draft new legislation that would address the needs of Christian Scientists and other faiths in a manner that comports with contemporary Establishment Clause jurisprudence and that meets other policy objectives of the Congress and the Executive Branch.

Finally, in the event that your office wishes to file a brief defending the statutory provisions on appeal in the case at bar, we are moving the court of appeals for an extension of the time within which briefs for appellants may be filed from January 24, 1997, to February 24, 1997.

Sincerely,

/s/ Janet Reno
Janet Reno

Enclosures

cc: Honorable Geraldine R. Gennet
Acting General Counsel to the Clerk
United States House of Representatives
Washington, DC 20515

Special Reimbursement Provisions for Christian Science Sanatoria

1. 42 U.S.C. 1395x(e), which includes in the definition of hospitals covered under Medicare "a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

2. 42 U.S.C. 1395x(y) (1), which includes in the definition of skilled nursing facilities covered by Medicare "a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts."

3. 42 U.S.C. 1320c-11, which exempts "a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts" from Medicate's utilization and quality control review requirements.

4. 42 U.S.C. 1396a(a) which exempts "a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts' from Medicaid's requirements that (i) participating institutions be subject to State health standards, (ii) treatment of the mentally retarded in intermediate care facilities meet specified standards, (iii) participating institutions be subject to State review of the appropriateness and quality of care and services provided, and (iv) compensated expenditures be subject to a utilization review plan.

5. 42 U.S.C. 1396g(e) (1) which exempts "a Christian Science sanatorium operated, or listed and certified, by

the First Church of Christ, Scientist, Boston, Massachusetts" from state licensure and oversight as a nursing home.

(SEAL) U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

June 13, 1997

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

This responds to the request to the request of your Chief of Staff, Mr. Thomas Mooney, for the Department's views on the constitutionality of two proposed draft bills – each dated May 14, 1997 – that would amend provisions of the Medicare and Medicaid Acts that currently provide special reimbursement exclusively for Christian Science nonmedical nursing services.[1]

We note at the outset that our analysis is necessarily preliminary because it may not fully address the significant financial and administrative concerns that the Department of Health and Human Services ("HHS") has raised regarding both proposals and because we understand that the proposed statutory language still is evolving. As the Attorney General has stated, however, the

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[1] *See, e.g.*, 42 U.S.C. §§ 1395x(e) (9), 1395x(y) (1), 1320c-11, 1396a(a) (62), 1396g(e) (1) (1994).

Administration respects the motivations behind the current statutory provisions, and the Department of Justice is available to assist Congress in attempts to craft new legislation that comports with the Constitution and that meets other policy objectives and practical concerns of the Congress and the Executive Branch.

Both draft bills are intended, *inter alia*, to provide Medicare benefits for nursing care *not* incident to medical care to persons who have religious objections to medical treatment.[2] Under the Medicare Act, such nonmedical institutional services currently are not universally available. To the contrary, expenses for "custodial care" are expressly excluded from Medicare coverage. 42 U.S.C. § 1395y(a)(9) (1994). The costs of such care may be reimbursed under Medicare only when – and because – such care is a necessary incident of medical care that the statute was intended to encourage and for which it provides. Many ailing persons – whether religious adherents or not – no doubt would like compensation for the expenses they incur for nursing care unaffiliated with medical care, or for other alternative treatments that they choose in lieu of medical care. But the Medicare Act

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[2] It is our understanding that the Medicaid Act does not, as a general matter, impose the sorts of detailed restrictions on, and criteria for, covered services that are found in the Medicare Act, and that the states have significant discretion in defining the scope of Medicaid benefits and beneficiaries beyond certain statutory minima. Because of these and other complications, our discussion in this Memorandum is limited to Medicare, although the constitutional principles we discuss should be applied in the same manner to amendments made to the Medicaid statutes.

generally provides no such compensation, with one exception: such benefits are provided on a sect-specific basis only in Christian Science sanatoria approved by the Christian Science Church. That exception for Christian Science sanatoria recently was declared unconstitutional in *Children's Healthcare Is a Legal Duty ("CHILD"), Inc. v. Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996). The Attorney General has declined to defend the Christian Science exception on appeal in the *CHILD* case because it is clearly unconstitutional.

We believe that the draft bill labeled "Revised Draft #2a" ("RD2A") fails adequately to address the constitutional concerns identified by the Attorney General in her January 23, 1997 letter to Congress.[3] The draft bill labeled "Rough Alternative Draft" ("RAD") raises fewer of those constitutional concerns – largely because, with the deletion of certain bracketed clauses, it would be a religion-neutral statute – and provides a framework for legislation that could pass constitutional muster while at the same time attempting to limit the risk of substantial cost increases in Medicare and Medicaid. Because we believe the RAD offers a promising approach, we will begin our analysis with that draft legislation.

A. ROUGH ALTERNATIVE DRAFT ("RAD")

The RAD would add a new § 1821 to Part A of title XVIII of the Social Security Act. Section 1821(a) (2) (B)

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[3] *See* Letter to the Honorable Albert Gore, Jr., President of the Senate, from Attorney General Janet Reno (Jan. 23, 1997) ("Attorney General Letter").

would describe the types of beliefs that would entitle persons to compensation for what the RAD calls "nonmedical institutional services." We refer to this as the "Belief Provision." Section 1821(a) (2) (C) would define the medical condition that such persons must have to entitle them to such compensation. And section 1821(a) (3) would specify that during a "spell of illness," a person may not receive both nonmedical institutional services benefits and benefits for medical services such as inpatient hospital services or extended care facility services. We refer to these two sections cumulatively as the "Medical Condition Provisions." Section 1821(b) would define the sorts of nonmedical institutional services for which benefits are available. We refer to this as the "Services Provision." Section 1821(c) would establish requirements for the institutions at which such compensable services could be provided. We refer to it as the "Institution Eligibility Provision."

1. Section 1821(a) (2) (B) – the Belief Provision

Section 1821(a) (2) (B) would provide that, in order to be eligible to receive nonmedical institutional services benefits, a person must have "declared (in a manner specified by the Secretary) that (i) the individual relies solely upon a [religious]/[nonmedical] method of healing, and (ii) the acceptance of medical health services by the individual would be inconsistent with the individual's [religious] beliefs." The drafters apparently have not yet decided whether the benefit should be limited to religious objectors. For the reasons we discuss in detail below in connection with RD2A, we think that limiting

the benefit to religious objectors to medical treatment would be unconstitutional. Our concern can be addressed by deleting the word "religious" from both sets of bold brackets.[4] In that case, an individual would be eligible to receive reimbursement for the costs of nonmedical institutional services only if, *inter alia*, that individual declared that his or her "beliefs" did not permit the receipt of any medical care.

We recognize that the bracketed inclusion of "religious" might reflect a desire to minimize the financial and administrative costs of the proposed nonmedical institutional care program. As discussed below, this goal can be furthered, at least in part, by limiting the benefits – as Congress originally intended and as the RAD would require – only to individuals whose medical condition would otherwise warrant hospitalization. The only beneficiaries of the alternative benefit then would be persons who otherwise would be entitled to the medical benefits of Medicare. And a beneficiary's election of nonmedical institutional services benefits typically should be less costly – at least on a daily basis – than if that same person had chosen hospitalization.

If congress wishes further to narrow the breadth of the Belief Provision, it can do so by creating what is, in effect, a "conscientious objector" class of beneficiaries, patterned on the class of conscientious objectors that has

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[4] For the same reasons, we recommend deletion of the bracketed religion references in subsections 1821(c) (1) (C) and 1821(c) (3) of the RAD.

been constitutionally permissible in the context of military service. Persons would be eligible if voluntary acceptance of medical health-care services would be inconsistent with their sincere religious beliefs or a comparable duty of ethical or moral conscience. For instance, the statute could provide that an individual would be eligible to receive reimbursement for nonmedical nursing services only if voluntary acceptance of medical care would be inconsistent with either the patient's sincere religious beliefs or a duty of conscience that is imposed by the patient's deeply and sincerely held ethical or moral beliefs and that is held with the strength of traditional religious convictions. *Cf.* 32 C.F.R. §§ 75.3(b), 75.5(c) (1) (1996) (setting forth belief requirement for military conscientious objection). This was the standard for conscientious objector status approved in, for example, *Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion).[5]

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[5] The Belief Provision could be written such that not just any moral or ethical beliefs will satisfy this standard. For example, in the context of conscientious objection in the military, the sense of obligation not to participate in war must be held "with the strength of traditional religious convictions," *Welsh*, 398 U.S at 340 (plurality opinion), and may not rest solely upon considerations of policy, pragmatism, or expediency, *id.* at 342-43. *See also id.* at 358-59 n.10 (Harlan, J., concurring); 32 C.F.R. § 75.3(b) (1996). In addition, Congress decided in the military context to require that conscientious objection be to participation in war "in any form," rather than simply to participation in a particular war. *See Gillette v. United States*, 401 U.S. 437 (1971). However, Congress could have opted to exempt the larger category of objectors to a particular war, *see id.* at 460, and analogous options are available in the case of nonmedical nursing Medicare benefits: For instance, Congress could decide

Where religious adherents are provided a benefit that is not universally available, the Establishment Clause requires that the breadth of the beneficiary class reasonably reflect a legitimate secular purpose for providing such benefits. *See Texas Monthly, Inc. v. Bollock*, 489 U.S 1, 15-17 (plurality opinion) (1989) (scope of beneficiary class must reflect legitimate "secular aim," and not have the "purpose or effect of sponsoring certain religious tenets or religious belief in general"). *See also Grumet v. Cuomo*, ___ N.E.2d ___, No. 61, 1997 WL 225811, at *5 (N.Y. May 6, 1997) ("The provision of a governmental benefit to a restricted class, when that class is formed along religious lines, is a telling index of non-neutral sectarian effect."). We believe that a beneficiary class patterned on the "conscientious objector" model (described above) could be justified as a response to legitimate secular aims. For

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to define the beneficiary class as persons conscientiously opposed to medical treatment "in any form," or as persons conscientiously opposed to the particular medical treatment relevant to a specific case (or something in between). In any event, Congress could require that the required belief be sincerely held. *Cf.* 32 C.F.R. § 75.5(c) (2) (1996). And, as in the military context, statements or conduct inconsistent with the stated belief can "cast considerable doubt on the sincerity of [a conscientious objection] claim." *Witmer v. United States*, 348 U.S. 375, 382-83 (1995). *Accord Windsor v. United States*, 419 U.S 938, 941 (1974) (Douglas, J., dissenting from denial of certiorari) ("Applicants for exemption as conscientious objectors may be found insincere where the belief claimed is inconsistent with prior statements or conduct of the applicant."). *See also* 32 C.F.R. §§ 75.5(c) (2), 75.5(c) (2) (i) (1996) ("consistency of application" of the alleged belief bears on sincerity; and "outward manifestation of the beliefs asserted" should be "carefully examined and given substantial weight").

example, Congress might aim to make available a form of palliative care that Congress could determine to be valuable – namely, nonmedical nursing care – to persons who, on account of their religious or moral beliefs, are unable to take advantage of the system's medical benefits.[6] We therefore believe that a conscientious objector class would be sufficiently broad and neutral to satisfy Establishment Clause requirements. *See Texas Monthly*, 489 U.S. at 15-16 (plurality opinion) (favorably citing *Welsh*, 398 U.S. at 356-61 (Harlan, J., concurring in result), and thereby suggesting that such a "conscientious objector" category of beneficiaries is sufficiently "expansive" to "withstand constitutional assault"); *id.* at 29 (Blackmun, J., joined by O'Connor, J., concurring in the judgment) (statute that exempted from taxation the sale of religious *and* atheistic literature "might survive Establishment Clause scrutiny").[7]

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[6] Moreover, it would be rational to provide such valuable palliative care only to persons who are *unable* to accept medical care, and not, for example, to persons who simply decline, for reasons short of conscientious compulsion, to accept the benefits to which they are entitled.

[7] *See also Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 716 (1994) (O'Connor, J., concurring) (a permissible "accommodation" exempting religious objectors from the draft could not distinguish between theistic, nontheistic, and atheistic belief); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (statute that singled out Sabbath observers for special treatment is unconstitutional because it did not accord similar treatment to "*ethical* and religious beliefs and practices of other private employees") (emphasis added). *See generally* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 326-36 (1996).

2. Sections 1821(a) (2) (C) and 1821(a) (3) – the Medical Condition Provisions

Section 1821(a) (2) (C) would limit nonmedical institutional services benefits to individuals who have "a condition that is found (in a manner consistent with subsection (e) (1)) to be comparable to the condition for which payment for inpatient hospital services furnished in a hospital would be permitted under this part." (Section 1821(a) (3) would specify that during a "spell of illness," a person may not receive both nonmedical institutional services benefits and benefits for medical services such as inpatient hospital services or extended care facility services. These provisions would be consistent with the limitations that Congress originally intended when it enacted the Christian Science sanatoria provisions. At that time, Congress indicated that it intended to reimburse Christian Science sanatoria care only for patients whose medical condition would otherwise require hospitalization: "Payment would only be made for bedfast patients who, except for their religion, would have to have been admitted to a hospital." S. Rep. No. 89-404, at 30 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1971. And the Christian Science Church itself agrees that, nonmedical nursing care should be reimbursed only "when the patient's condition is such that, were it not for his or her religious beliefs, the patient would be hospitalized." Reply Brief in Support of Motion of Defendant-Intervenor, the First Church of Christ, Scientist, for Summary Judgment, and in Opposition to Plaintiffs' Motion for Summary Judgment at 11 n.7, in *CHILD, Inc. v. Vladeck* (D. Minn.) (Civ. No. 3-96-63).

The Medical Condition Provisions would, in effect, limit eligibility for reimbursement to nursing care for medical conditions that ordinarily would necessitate hospitalization (and that would otherwise entitle the patient to receive reimbursement). This critical limitation should help minimize any costs that are incurred beyond those that would have been incurred had the participants exercised their statutory right to receive the option of medical treatment. The question remains, however, how the Secretary is to determine whether a medical objector has a medical condition "for which payment for inpatient hospital services furnished in a hospital would be permitted." Section 1821(a) (2) (C) indicates that this determination must be made "in a manner consistent with subsection (e) (1)."

Unfortunately, we cannot tell what the statutory reference is intended to be, because the bill does not contain any section (e) (1) to which the citation might refer. (Proposed § 1821 does not have a § (e) (1); and § (e) (1) of the RAD itself concerns effective dates.) We assume, then, that the intended referent was supposed to be RAD § 1821(a) (4), which would provide:

> The Secretary may not require any individual to undergo any medical screening, examination, diagnosis, prognosis, or treatment of any kind or to accept any other medical health care services as a condition to qualify for coverage of nonmedical institutional services under this section.

This proposed prohibition evidently reflects a concern that some program recipients (such as Christian Scientists) would object, on religious or comparable

moral grounds, to any "medical diagnosis" requirement. We understand this concern. But the Secretary nevertheless must be provided some reliable way of determining – on a neutral, secular basis – whether Christian Scientists and other potential beneficiaries) indeed do have a medical condition "for which payment for inpatient hospital services furnished in a hospital would be permitted," thereby justifying the provision of Medicare benefits.[8]

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[8] We note in this regard that, although the Social Security Administration ("SSA") does not impose upon religious objectors the general requirement that persons obtain medical treatment to alleviate a disability before receiving disability benefits, *see, e.g., Lewis v. Califano*, 616 F.2d 73, 78 (3d Cir. 1980) (describing SSA's policy), SSA does not permit persons to invoke religious beliefs as a reason for a failure to submit evidence of medical disability in the first instance. *See* 20 C.F.R. §§ 404.1516, 410.472, 410.475, 416.916 (1996). *See also, e.g., Fohrmeister v. Commissioner*, 1997 WL 143927 (U.S. Tax Ct. Mar. 31, 1997) (Christian Scientist not eligible for tax exception for distributions attributable to disability where "religious beliefs prevented him from seeking the medical examination necessary to ascertain the extent and gravity of his condition"); *Karolis v. New Jersey Dep't of Corrections*, 935 F. Supp. 523 (D.N.J. 1996) (although prison did not require Christian Science inmates to submit to medical treatment for tuberculosis, it did and could (despite the Religious Freedom Restoration Act) require inmates to be tested for TB); *State ex rel. Holcomb v. Armstrong*, 239 P.2d 545 (Wash. 1952) (although school did not require Christian Science student to undergo treatment for tuberculosis, it did and could (despite the Free Exercise Clause) require student to be tested for TB).

3. Section 1821(b) – the Services Provision

Section 1821(b) would define nonmedical institutional services to include "nonmedical items and services that are provided in a nonmedical institution and that support the individual's physical improvement, but only to the extent that payment would be permitted for such items and services as are comparable to (or the equivalent of) inpatient hospital services if furnished in a hospital." This provision, like the Medical Conditions Provisions, would serve to limit the expenses of the program by ensuring that no payment be made for services that are not "comparable to (or the equivalent of) inpatient hospital services if furnished in a hospital."

Apart from the requirement that services be provided in a nonmedical institution – which we discuss in the next section – this Provision raises no constitutional concerns. The Establishment Clause prohibits the government from providing reimbursement for religious activity, such as proselytizing or religious "healing." *See, e.g., Bowen v. Kendrick*, 487 U.S 589, 614-15, 621 (1988).[9] Accordingly, the care that is subject to reimbursement must genuinely be secular, such as the types of nursing services for which Medicare reimbursement ordinarily is made when such

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[9] *See also id.* at 623 (O'Connor, J., concurring); *id.* at 624 (Kennedy and Scalia, JJ., concurring); *id.* at 642-47 (dissenting Justices). *Accord Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2525 (1995) (O'Connor, J., concurring) (describing the "bedrock principle" that prohibits "direct [government] funding of religious activities"); *id.* at 2523 (majority opinion) ("[S]pecial Establishment Clause dangers" arise whenever "the government makes direct money payments to sectarian institutions.").

services are incident to medical care.[10] We read the RAD to satisfy this requirement by providing that items and services must be those that "are comparable to (or the equivalent of) inpatient hospital services" that otherwise would be provided if the patient were hospitalized.

We are, however, somewhat concerned about the further requirement that the items and services "support the individual's physical improvement." This might suggest that the government determine whether Christian Science care and other alternative forms of healing do, in fact, "support the individual's physical improvement" – a determination that could itself raise serious constitutional concerns. *Cf. United States v. Ballard*, 322 U.S. 78, 85-88 (1944). Accordingly, we recommend deletion or modification of this clause.

4. Section 1821(c) – the Institution Eligibility Provision

In determining which institutions would qualify to provide reimbursable nonmedical institutional services, the government must apply nonreligious criteria. Eligibility may not be limited to institutions with a religious

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[10] The Constitution does not require that an express proscription on the use of government funds for religious activities (by individuals as well as participating institutions) appear in the statute itself, *see Bowen*, 487 U.S at 600-01. Nonetheless, we recommend including such a limitation in the statutory amendments in order to provide clear guidance on permissible use of the funds and to avoid as-applied challenges (such as the claim in the *CHILD* case that funds are being used as reimbursement for the costs of Christian Science practitioners' religious activities).

affiliation, or to those "organized on the basis of observation of religious beliefs," or any other sectarian consideration. Eligible institutions may include those with a religious affiliation, but only if they satisfy the same secular standards as other, non-religiously affiliated institutions. *See Bowen*, 487 U.S. at 606-12.

Section 1821(c) of the RAD would establish requirements for the institutions at which compensable nonmedical nursing services could be provided. It would provide, *inter alia*, that eligible institutions must be tax-exempt organizations under § 501(c) (3) of the Internal Revenue Code. Section 1821(c) (1) (A). This would appear to be permissible. *See Texas Monthly*, 489 U.S. at 123-13, 15-16 & n.6 (plurality opinion). Section 1821 (c) would also require that an eligible institution:

- (i) provide "only nonmedical nursing items and services," § 1821(c) (1) (C);

- (ii) provide such services "exclusively to patients [who meet the "Benefits Provision" criteria of § 1821(a) (2) (B)]," *id.*;

- (iii) provide such nonmedical items and services "exclusively through nonmedical nursing personnel," § 1821(c) (1) (D); and

- (iv) "[on the basis of its religious beliefs] does not provide . . . medical items and services (including any medical screening, examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients," § 1821(c) (1) (F).[11]

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[11] See also the provision in § 1821(b) that would define covered services to include only services provided "in a nonmedical institution."

With the exception of the bracketed reference to "religious beliefs" in § 1821(c) (1) (P),[12] these criteria do not, on their fact, establish an impermissible religious preference. We note however, that courts may well invalidate "fixes" to statutes previously violative of the Establishment Clause where such fixes "for all practical purposes, . . . effectively replicate[] the prior unconstitutional [provisions]." *Grumet v. Cuomo*, ___ N.E. 2d ___, No. 61, 1997 WL 225811, at *9 (N.Y. May 6, 1997). Facially neutral criteria might not suffice to insulate a statute from Establishment Clause challenge if such criteria "effectively distinguish[ ]" among religions, *Larson v. Valente*, 456 U.S 228, 247 n.23 (1982), or are "drafted with the explicit intention" of preferring "particular religious denominations," *id.* at 254-55 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).[13] To minimize the risk of litigation in this regard, we recommend that Congress articulate – either in the statute or in legislative history – legitimate administrative or other secular reasons for the limitations in RAD on institution eligibility, and craft such limitations in a manner that reasonably reflects those secular concerns. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543-46 (1993); *Grumet*, 1997 WL

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[12] For reasons explained below in the discussion of RD2A, we believe that this would plainly be unconstitutional; therefore, we recommend it be deleted.

[13] *See generally id.* at 248-51; *Grumet*, 1997 WL 225811, at *5-*9. *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S 520, 534-46 (1993); *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987); *Larson v. Valente*, 456 U.S. 228, 248-51 (1982); *Droz v. Commissioner*, 48 F.3d 1120, 1125 n.5 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 698 (1996).

225811, at *7-*8. For example, § 1821(a) (2) (B) would require that an institution not provide services – even absent any Medicare reimbursement – to persons who do not satisfy the "Belief Provision" prerequisite. If Congress wishes to retain this requirement, it should explain why an eligible institution may not provide nonmedical care (not covered by Medicare) to persons who would not satisfy the Belief Provision of the RAD. Similarly, § 1821(C) (1) (D) would require eligible institutions to provide services "exclusively through nonmedical nursing personnel." We are concerned this could be construed to preclude, for example, the use of persons who are registered medical nurses to provide nonmedical items and services; and we do not see an obvious secular purpose for such a restriction.

B. REVISED DRAFT #2A

RD2A would delete the express reference to Christian Science sanitaria that presently appear in the Medicare statues.[14] However, it appears that RD2A would, in effect, simply reenact, the present, unconstitutional sanatoria provisions, albeit replacing all references to sanatoria with references to "religious nonmedical health care institutions." We do not think that such minor changes would suffice to remedy the Act's present Establishment Clause problems.

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[14] *See supra* note 2 (regarding Medicaid).

The RD2A would not have any express "Beliefs," "Medical Condition," or "Services" provisions comparable to the limitations in the RAD. It merely would provide that a "religious nonmedical health care institution" is eligible to participate in Medicare, and then define "religious nonmedical health care institution" in a new § 1861(oo) (1) of the Medicare Act. That definition would be subject to the same concerns we identified, in section A-4 of this Memorandum, respecting to the RAD Institution Eligibility Provision. More importantly, however, RD2A's new § 1861 (oo) (1) would include two limitations that we think are unconstitutional: it would limit the benefit to persons who decline medical treatment for religious reasons; and it would expressly require beneficiaries to obtain nonmedical services in religious institutions.

1. Eligible institutions would be required to provide "only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs." Section 1861(oo) (1) (C). In other words, persons would be ineligible for benefits – even in eligible "religious" institutions – if they decline medical treatment for reasons that are not religious. This discrimination in favor of religious adherents would violate the Establishment Clause.

As a general rule, the government may not provide a public benefit exclusively to religious adherents; instead, in order to pass muster under the Establishment Clause, government benefits must be provided on a religion-neutral basis. *See, e.g., Texas Monthly, Inc. v. Bullock,* 489

U.S. 1 (1989); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703-05 (1994). It is a "principel at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." *Id.* at 703.[15] Therefore, Congress may provide such benefits to religious adherents only when such persons are included in a broader class of similarly situated beneficiaries defined in secular terms and reflecting some legitimate secular aim. *See Texas Monthly*, 489 U.S. at 15-17 (plurality opinion) (scope of beneficiary class must reflect legitimate "secular aim," and not have the "purpose or effect of sponsoring certain religious tenets or religious belief in general"). *See also Grumet v. Cuomo*, ___ N.E.2d ___, No. 61, 1997 WL 225811, at *5 ("The provision of a governmental benefit to a restricted class, when that class is formed along religious lines, is a telling index of non-neutral sectarian effect.").

The RDZA would limit eligibility for nonmedical nursing benefits to a beneficiary class consisting solely of religious objectors to medical treatment. Presumably this

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[15] In *Texas Monthly*, for example, the Court invalidated a sales-tax exemption provided exclusively to religious periodicals. The plurality reasoned that "when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community." 489 U.S. at 15 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring in the judgment)).

preference for religion would be defended as an "accommodation" of religious exercise. And in fact, the district court in the *CHILD* case did suggest that, under the Supreme Court's "accommodation" doctrine, a religion-specific benefit would pass constitutional muster if it were not sect-specific. We do not think, however, that the Supreme Court's "accommodation" doctrine is germane here, because the Medicare Act does not create the type of burden on the exercise of religion that must be present in order to justify a religion-specific exemption.

A statutory exception exclusively for religion may be a permissible "accommodation" where, *inter alia*, the exception has the purpose and effect of "alleviat[ing] *significant* governmental interference" with the exercise of religion. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335, 339 (1987) (emphasis added). *See also Kiryas Joel*, 512 U.S. at 705 ("the Constitution allows the State to accommodate religious needs by alleviating *special* burdens") (emphasis added); *Texas Montly*, 489 U.S. at 15 (plurality opinion) (religion-only accommodation must remove "a *significant* state-imposed deterrent to the free exercise of religion") (emphasis added).[16]

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[16] Even where a religion-only exemption would lift a significant or "special" government-imposed burden, the Constitution might require extending the "accommodation" to comparably situated nonreligious persons if – as in the selective service cases such as *Welsh* – the exemption nonetheless "burdens nonbeneficiaries markedly." *Texas Monthly*, 489 U.S. at 15 (plurality opinion). *See also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (invalidating religious preference that did not lift government-imposed burden and that did impose substantial burdens on nonbeneficiaries).

The district court in the *CHILD* case reasoned that, absent a provision for reimbursement for Christian Science sanatoria nursing care, the Medicare Act would impose a burden of the sort that the government could accommodate in a religion-specific (but not sect-specific) manner – such as provision to religious objectors of an alternative nonmedical nursing-care benefit. *See CHILD, Inc.*, 938 F. Supp. at 1476-78. In identifying this "burden" on Christian Scientists, the district court reasoned that, absent a nonmedical nursing-care exception, Medicare would "forc[e] Christian Scientists to choose between: 1) following their religion and enduring financial hardship; or 2) violating an apparently deeply held belief and receiving Medicare and Medicaid benefits." *Id.* at 1476 (emphasis added).[17]

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[17] Indeed, the district court further found that, without the Christian Science sanatoria provisions, the Medicare Act would "*substantially* burden[] the exercise of [Christian Scientists'] religion." 938 F. Supp. at 1477 n.23. Accordingly, the court strongly suggested that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4 (1994), would (absent some other compelling, narrowly tailored government interest) require provision of nonmedical nursing benefits – albeit on a sect-neutral basis – to persons who could not for religious reasons accept medical benefits. 938 F. Supp. at 1476-78. Similarly, the Christian Science Church has asserted in the *CHILD* case that, in light of the invalidation of the sanatoria provisions, the Medicare Act substantially burdens their exercise of religion, thereby triggering a right under RFRA to reimbursement for the costs of nonmedical nursing care. Memorandum of Law of Defendant-Intervenor the First Church of Christ, Scientist, in Support of its Motion to Amend the Judgment, at 3-8, *CHILD, Inc. v. Vladeck* (D. Minn.) (Civ. No. 3-96-63). This conflation by the Church and by the district court – of "significant" burdens that may permit religious

We do not agree that this "financial hardship" theory can support a religion-specific "accommodation" here. The Supreme Court's jurisprudence simply does not support characterizing as a significant government-imposed burden the existence of a secular governmental benefit that certain persons choose, for religious reasons, not to accept. Although the Supreme Court has never addressed the precise issue of whether the mere inability of religious adherents to accept a generally available benefit may permit a religion-only accommodation, we think it is clear from the decisions the Court has issued in this area that such an inability does not constitute the sort of "burden" that may support a religion-only accommodation. For example, in *Texas Monthly*, the court held that, even where a neutral government program incidentally imposes a monetary "cost" on the exercise of religion by religious entities, the Establishment Clause nonetheless

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accommodations, on the one hand, and "substantial" burdens that might, under RFRA, require such accommodations, on the other – demonstrates a danger that the Attorney General anticipated in her letter to Congress: If one accepts the notion that a person's religious exercise has been "significantly burdened" any time the federal government offers a benefit that that person declines for religious reasons to accept, it may be but a short step to the conclusion that such benefits create a "substantial burden" that requires a religious exemption absent a narrowly tailored, compelling reason for denial of such exemption. In the Attorney General's words, characterizing the provision of Medicare benefits as any sort of a government-imposed burden of accommodation purposes "would open to challenge most, if not all, government benefit programs – federal, state, or local – on the grounds that some group or person is unable, for religious reasons, to accept the benefits offered." Attorney General Letter at 8.

forbids the government from lifting that "financial burden" only as to religious entities. *See also Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 390-93 (1990) (refusal to grant exemption from generally applicable tax to those who distribute religious materials "imposes no constitutionally significant burden" on the distributors' exercise of religion). Similarly, and as explained at pages 8-9 of the Attorney General's Letter to Congress, we think that the "financial hardship" identified by the district court in this case does not establish a "burden" on religious exercise that is "significant" or "special" in the sense necessary to permit a religious preference consistent with the Establishment Clause.

Moreover, the district court's theory of what constitutes a significant burden does not have an obvious stopping point. The "disincentive" to Christian Scientists' religious conduct created by the Medicare provision of medical benefits is not materially different than the disincentive that necessarily exists whenever any religious adherent declines, for religious reasons, to accept a valuable benefit the government makes generally available. For example, many students choose for religious reasons to forego free public schooling in order to attend religious schools. Certainly when a state decides to provide free education on secular subjects (or other secular services) exclusively within the public schools – and does not extend such secular benefits to students in private schools – that can exert great pressure on the religiously motivated choice of religious-school students. Indeed, because of the obvious advantages of subsidized education, some students likely choose to attend public schools despite religious dictates to do otherwise. Accordingly,

the state's provision of public educational benefits can be characterized as effectively (albeit inadvertently) imposing a "financial hardship" on the religiously motivated (and constitutionally protected) choice to attend religious schools. It is plain, we think, that this is not a "burden" of the sort that would permit the state to reimburse religious-school students for the costs of the secular components of their private education while not providing such reimbursement to similarly situated private-school students who abstained from public education for non-religious reasons.[18] To the contrary, the Establishment

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[18] In the context of Free Exercise Clause and RFRA claims, the courts consistently have held that when a state provides secular benefits (such as transportation to school, speech transliteration in school, eligibility for interscholastic athletics, or eligibility to participate in an extracurricular music program) exclusively in the context of public schooling, the resultant financial "cost" that must be borne by religious-school students who do not receive such benefits imposes, at most, a "de minimis," insignificant, or insubstantial burden on their exercise of religion. *See, e.g., Goodall by Goodall v. Stafford County School Bd.*, 60 F.3d 168, 171-73 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 706 (1996); *Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *Walsh v. Louisiana High School Athletic Ass'n*, 616 F.2d 152, 158 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981); *McCarthy v. Hornbeck*, 590 F. Supp. 936, 943-46 (D. Md. 1984); *Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 820-24 (D. Del. 1979), *aff'd mem.*, 615 F.2d 1355 (3d Cir. 1980); *Thomas v. Allegany County Bd. of Educ.*, 443 A.2d 622, 625 (Md. Ct. Spec. App. 1982); *Cooper v. Oregon School Activities Ass'n*, 629 P.2d 386, 390-91 (Or. Ct. App.), *review denied*, 634 P.2d 1347 (Or. 1981). *See also Wilmington Christian School, Inc. v. Board of Educ. of Red Clay Consol. School Dist.*, 545 F. Supp. 440, 444-47 (D. Del. 1982); *Luetkemeyre v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

Clause would prohibit a state from providing such benefits in a manner that discriminates in favor of religiously motivated private-school students. *See Kiryas Joel*, 512 U.S. at 709 (dicta) (Establishment Clause would prohibit a "patently unequal law" that provided school transportation only for children attending Christian day schools).[19]

We do not think that the accommodation analysis is affected by the fact (emphasized by the district court) that Christian Scientists are – like all other similarly situated persons – required to make financial contributions to the Medicare program. As the United States previously has argued, "one can hardly imagine a more neutral and secular activity – or one that is any less burdensome on the free exercise of religion – than the payment of generally imposed taxes." Brief for the United States at 19,

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[19] *See also id.* at 702 (Expressing "concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (*and nonreligious*) groups") (emphasis added); *id.* at 708 (if New York wishes to "accommodate the Satmar community without violating the Establishment Clause," it must give comparable aid to "all groups similarly interested in separate schooling"); *Mueller v. Allen*, 463 U.S. 388, 396-97 (1983) (in upholding tax deduction for educational expenses against Establishment Clause challenge, the Court deemed it "particularly significant" that "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend *nonsectarian private schools or sectarian private schools*") (second emphasis added); *Texas Monthly*, 489 U.S. at 11 (plurality opinion); *Grumet v. Cuomo*, 1997 WL 225811, at *09; Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 387 & nn.254-55. *Cf. Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788-89 (1973).

United States v. Lee, 455 U.S. 252 (1982) (No. 80-767). The degree of burden on religious activity caused by tax obligations, moreover, does not materially change simply because the revenues are used to pay for social welfare programs that involve government activities that are in conflict with the taxpayers' religious beliefs, *id.* at 23, or programs in which the taxpayers would, for religious reasons, choose not to participate, *see* Reply Brief for the United States at 2, *United States v. Lee*, 455 U.S. 252 (1982) (No. 80-767).[20]

The district court alternatively suggested that this case is analogous to *Sherbert v. Verner*, 374 U.S. 398 (1963), and its progeny.[21] As the district court noted, in those

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[20] The situation perhaps would be different where "the mere act of paying the tax, by itself, violates [someone's] sincere religious beliefs." *Jimmy Swaggart Ministries*, 493 U.S. at 392. This was the situation with respect to the Amish in the *Lee* case. 455 U.S. at 255. *See also id.* at 257 ("We . . . accept appellee's contention that both *payment and* receipt of social security benefits is forbidden by the Amish faith.") (emphasis added). In that case, an exemption from the obligation to pay the tax – like that found in 26 U.S.C. § 1402(g) (1994) – arguably could be justified as lifting a significant government-imposed burden. But we are unaware of any assertion that it would violate Christian Scientists' religious convictions merely to make payment into the Medicare system for other people's' medical treatment. And in any event, if there is such a religious objection to payment, it is hard to see how that burden would be lifted by provision of nonmedical nursing services, since Christian Scientists' earnings would still be contributing to the cost of others' medical care.

[21] *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).

cases the Supreme Court found that by conditioning receipt of unemployment benefits upon conduct proscribed by religious faith, a state "substantially burden[s]" religious exercise insofar as such a condition " '[it[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " 938 F. Supp. at 1476 (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981)). *See also id.* at 1477 (finding that RFRA effectively extends the *Sherbert* rationale, as a statutory matter, "to all burdens on free exercise"). As the Attorney General explained in her letter, *Sherbert* is not an apposite analogy. In particular, the Attorney General described that there is a critical distinction between a case like *Sherbert*, in which a qualification for a secular benefit effectively denies persons eligibility for the benefit because of their religious conduct, and a statute such as the Medicare Act, where the government offers a secular benefit (reimbursement for medical care) that certain persons decline for religious reasons. The federal government has not conditioned Christian Scientists' eligibility for Medicare on conduct proscribed by the religious faith; rather, it has offered a benefit – medical care – the content of which they choose, for religious reasons, not to accept. Attorney General Letter at 9. It cannot be the case that the latter situation creates a "significant burden" on religious exercise that may be alleviated under the accommodation doctrine or, as the district court found and as the Christian Science Church contends, *see supra* note 17, a "substantial burden" that must be alleviated under RFRA unless the government can demonstrate a compelling interest. *See United States v. Lee*, 455 U.S. 252, 261 (1982) ("every person cannot be

shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs").

The Christian Science Church, in the *CHILD* litigation, attempts to describe the Medicare Act in a manner that fits the *Sherbert* "burden" model. Specifically, the Church argues that Medicare creates a "right to universal coverage for needed nursing care," and that acceptance of medical care effectively is a prerequisite to this so-called "right" to nursing care. Because Christian Scientists cannot accept medical care, this argument goes, their religious principles prevent them from satisfying the requirements for receipt of the nursing care to which they otherwise would be entitled.[22] The problem with framing the argument in this manner, as HHS informs us and our review of the statute confirms, is that the major factual premise is simply wrong: under Medicare, there is no "right to universal coverage for needed nursing care" attendant to whatever form of "healing" an ailing person might choose. Outside the Christian Science sanatoria

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[22] Memorandum of Law in Support of Motion of Defendant-Intervenor, the First Church of Christ, Scientist, for Summary Judgment, and in Opposition to Plaintiff's Motion for Summary Judgment, at 1-2. *Accord id.* at 25-26, *CHILD, Inc. v. Vladeck* (D. Minn.) (Civ. No. 3-96-63) (describing the "deterrent to free exercise that would be present if poor and elderly Christian Scientists were forced to obtain vital nursing care in medical institutions"). *See also* Letter for Michael Small, Deputy Associate Attorney General, from Michael W. McConnell, Counsel for the Christian Science Church, at 2 (Apr. 10, 1997) ("In our situation, patients cannot obtain otherwise available nursing care unless they are willing to violate their convictions against the use of medicine.").

context, nursing care benefits are available under Medicare only when – and because – nursing care is an integral component of the medical care to which the Medicare law is addressed.[23] There are many ailing persons – whether religious adherents or not – who, although eligible for hospitalization, nonetheless choose alternative methods of healing. Such persons no doubt would like to be compensated for the costs of such nursing care, and for other expenses that Medicare covers as an incident of hospital care. But there simply is no such statutory entitlement to "stand-alone" nursing care benefits, even for very sick people – to the contrary, such benefits are proscribed by the custodial-care prohibition in 42 U.S.C. § 1395y(a) (9) (1994).[24] Thus, Christian Scientists are unable to receive reimbursement for nursing care not because they fail to satisfy some "medical-care" prerequisite for receipt of a nursing-care entitlement, but because they decline to accept the benefit of which such nursing care is part and parcel – namely, medical care.[25]

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[23] HHS has informed us that the Medicare Act provides nursing care benefits in contexts other than hospitalization, but always incident to the provision of a medical-care benefit (rather than as a stand-alone benefit).

[24] Of course, if Congress were to provide nursing care benefits to all persons who are very ill – without regard to which form of "healing" they choose to rely upon – such a universal benefit would encompass nursing incident to Christian Science care. That would be a religion-neutral way of addressing the problem; but it is our understanding that Congress does not wish to provide such nursing care generally, without regard to the form of "healing" that beneficiaries might elect to use.

[25] Analogy to the public-school context again is instructive. In a state that provides certain "benefits" (e.g., textbooks,

For all of these reasons, we do not think that restricting the "nonmedical nursing care" benefit to religious objectors can be justified by the accommodation doctrine. However, as explained in the discussion of the RAD, we do think it would be permissible to limit the class of beneficiaries to "conscientious medical objectors" beneficiaries, analogous to the class of persons who were entitled to conscientious objector status in the military context – i.e., persons who feel duty-bound to decline medical care on religious grounds or for reasons of conscience comparable to religious convictions. Such a limitation could be justified as a response to legitimate secular aims and define a class sufficiently broad and neutral to satisfy Establishment Clause requirements. *See supra* at 5. Moreover, such a class of eligible recipients might well not be much broader than the class of recipients under the current Christian Science provisions of Medicare. And, although it would be impossible to predict with certainty, the financial and administrative scope

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transportation, school lunches, computers, etc.) only as part of a public-school education, religious-school students could not complain that failure to extend such benefits to them "significantly burdens" their Free Exercise right to choose religious school. (And as the cases cited in note 18, *supra*, demonstrate, refusing to extend such benefits to religious-school students certainly does not create a "substantial burden" that triggers RFRA analysis.) Nor is this conclusion affected simply by referring to public-school education as a "requirement" or "prerequisite" that triggers the "right" to the benefits of textbooks, transportation, etc. Buses, textbooks, and the like, are merely components, or incidents, of the "right" to public education: they are not themselves universal entitlements that the state in question guarantees to all students.

of the Medicare nonmedical nursing care benefit would not likely be unduly expanded, as long as nonmedical nursing benefits are provided – as Congress originally intended – only to individuals whose medical condition would otherwise warrant hospitalization. (The RDZA apparently would not so provide, in contrast to the RAD.) In that case, the only beneficiaries of the alternative nursing-care benefit would be persons who otherwise would be entitled to the medical benefits of Medicare.

2. The RDZA expressly provides in addition that religious medical objectors would be required to receive nonmedical nursing care in religious nonmedical institutions, i.e., in an institution that refuses to provide medical services "on the basis of its religious beliefs." Section 1861 (oo) (1) (F). This creates additional problems under the Establishment Clause in that it creates a preference for religious institutions over nonreligious institutions and cedes civil authority to such religious institutions.

Whatever the permissible scope of the accommodation doctrine might be, it cannot justify such a preference. Even if it could be said that there is a religious "accommodation" here, in theory that accommodation would be intended to relieve some burden on the religious exercise of individual religious believers. As the Attorney General pointed out in her letter to Congress, Medicare and Medicaid provide benefits for individuals, not for established groups. Attorney General Letter at 6. And, the "burden" that arguably would be lifted by the proposed Medicare amendments is a burden on religious adherents, not on religious institutions. But in effect, the "institutional religious beliefs" requirement of RDZA would force persons

who seek Medicare benefits to receive their nursing services in locations approved by an official church: Eligibility would turn not only on the need for or the quality of nursing services, but also on whether the services provided bore a church's stamp of approval. We can think of no valid, secular reason to require such medical objectors to receive the services in question in a religious institution, if the alleged burden on religious exercise could be equally lifted by receipt of nonmedical services in a nonreligious institution.[26] To require beneficiaries to rely on religious institutions is, in effect, impermissibly to delegate power "to a group chosen according to a religious criterion." *Kiryas Joel*, 512 U.S. at 698-99. *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123-27 (1982) (State may not give churches veto over liquor licenses); *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1343-46 (4th Cir. 1995) (municipality may not empower council of Rabbis and three designees of Orthodox Jewish organizations to establish and enforce kosher food standards); *Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992) (similar), *cert. denied*, 507 U.S. 952 (1993). (And the Establishment Clause concerns triggered by such a limitation would be accentuated by the fact that such a requirement also would be in sharp tension with

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[26] For example, as the Attorney General explained in her letter to Congress, the government has no apparent secular interest in denying Medicare benefits to a Christian Scientist who receives nursing services from a state-licensed nursing home or state-licensed nurses, while granting benefits to a Christian Scientist who receives those same services from a sanatoria or other religious institution. Attorney General Letter at 6.

Medicare's guarantee of free choice to patients in selecting health care institutions. 42 U.S.C. § 1395a (1994).)

In this same vein, we note further that the RDZA would require institutions to provide services only to beneficiaries who rely "solely upon a religious method of healing." Section 1861 (oo) (1) (C). We fail to see how this requirement could be justified on any legitimate ground. In particular, we see no reason to require beneficiaries to foreswear nonreligious nursing services in addition to medical treatment.

* * *

Thank you for the opportunity to present our views on this important matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

/s/ Ann [Illegible]
Andrew Fois
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member